

N. 2885

No. 14197

**United States  
Court of Appeals  
for the Ninth Circuit**

W. O. BEDAL,

Appellant,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Appellee;

and

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Appellees.

**Transcript of Record**

**Appeals from the United States District Court  
for the District of Idaho**

**FILED**

MAR 19 1954



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for the Ninth Circuit

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Appeals from the United States District Court  
for the District of Idaho



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

LAUREL E. ELAM,  
CARL A. BURKE,  
CARL P. BURKE,  
FRED M. TAYLOR,  
Boise, Idaho,

Attorneys for Appellant.

BRYAN P. LEVERICH,  
10 South Main Street,  
Salt Lake City, Utah;

L. H. ANDERSON,  
E. H. CASTERLIN,  
E. C. PHOENIX,  
P.O. Box 530,  
Pocatello, Idaho;

OSCAR W. WORTHWINE,  
P.O. Box 737,  
Boise, Idaho;

J. L. EBERLE,  
Idaho Building,  
Boise, Idaho.

Attorneys for Appellees.



In the United States District Court, for the  
District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Defendant.

### COMPLAINT

The plaintiffs complain of the defendant and al-  
lege as follows:

#### I.

That the plaintiffs, and each of them, are corpo-  
rations organized and existing under the laws of  
the State of Utah; the defendant, The Hallack and  
Howard Lumber Company, is a corporation organ-  
ized and existing under the laws of the State of  
Colorado. The matter in controversy exceeds, ex-  
clusive of interest and costs, the sum of \$3,000.00.

#### II.

That on the 3rd day of March, 1944, the plaintiffs  
herein, as lessor, entered into a lease agreement  
with the defendant, The Hallack and Howard Lum-  
ber Company, as lessee, whereby a portion of the  
lessor's premises at Banks, Boise County, Idaho,

was leased to the said Lumber Company for a log loading site, a true copy of which lease is hereto attached marked Exhibit "A" and made a part hereof. That said lease, among other things, provides that the lessee, The Hallack and Howard Lumber Company, agrees to hold harmless the lessors, plaintiffs herein, and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing "by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

### III.

That on or about the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect and that at said time and place, while the defendant, its agents, servants, or employees, were unloading logs onto said leased premises and using and occupying said premises in accordance with the terms and conditions of said lease, a piece of timber broke off one of the logs being unloaded and struck one A. M. Powell, a car inspector employed by the Union Pacific Railroad Company at Banks, Boise County, Idaho, seriously injuring the said Powell.

### IV.

That as a result of said accident and injuries sustained, A. M. Powell, on the 3rd day of October,

1950, filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained, demanding judgment in the sum of \$45,000.00

V.

That thereupon the plaintiff, Union Pacific Railroad Company, gave notice to the defendant herein of the pendency and nature of said action, calling its attention to the lease and its provisions hereinbefore referred to, and tendered to said defendant the defense of said action, requesting that said defense be undertaken by it, with notice that the plaintiff Union Pacific Railroad Company expected to be fully reimbursed for any judgment that might be recovered against it by the said Powell, together with all expenses incurred in the event said defendant did not take over said defense and assume all liability, but that said defendant refused and neglected to do so.

VI.

That the Plaintiff, Union Pacific Railroad Company, conducted said defense in said action in good faith and with due diligence before the court and jury, commencing the 26th day of February, 1951, and on the 2nd day of March, 1951, the jury returned a verdict in favor of said plaintiff, A. M. Powell, and against the said Union Pacific Railroad Company in the sum of \$15,000.00. Judgment on the verdict, including costs in the amount of \$92.26,

with interest at 6% per annum, was entered, and on September 18, 1951, Motion for Judgment Notwithstanding the Verdict was by the court denied, and which judgment the defendant herein had notice but it failed, refused and neglected to take any part in any or all of the further proceedings had in connection with said action.

#### VII.

That thereafter, to wit, on the 15th day of December, 1951, the said Union Pacific Railroad Company compromised said judgment by paying to the plaintiff the total sum of \$14,500.00 and said judgment was fully satisfied.

#### VIII.

That the defendant, although requested to do so, has failed and neglected to pay the plaintiffs, or either of them, all or any part of the damages and expenses incurred arising out of the action of A. M. Powell vs. Union Pacific Railroad Company, and the plaintiff, Union Pacific Railroad Company, has been damaged thereby for settlement in satisfaction of the judgment in said case in the amount of \$14,500.00; costs and expenses of the litigation \$1,076.98, together with reasonable attorneys fees in the amount of \$1,425.00.

#### IX.

That the accident and resulting injuries to the said Powell were wholly caused by the use and occupation of said leased premises and the unloading of logs thereon by The Hallack and Howard Lumber Company, its agents, servants or employees, who



had the sole and exclusive jurisdiction over said premises and the unloading of said logs thereon, and that accordingly, under the provisions of said lease agreement, or independent of said lease, it became and was the duty of the defendant to assume and pay for all injuries and damages sustained by the said A. M. Powell, and to indemnify the plaintiffs, particularly the Union Pacific Railroad Company, against, and save them harmless from, all liability from such injuries, damages or loss.

Wherefore, plaintiff, Union Pacific Railroad Company, prays judgment against the defendant, The Hallack and Howard Lumber Company, in the sum of \$17,001.98, with interest thereon at the rate of 6% per annum from the 15th day of December, 1951, and for such other relief as may be deemed proper in the premises.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.



EXTENSION RIDER *Exhibit "A"*

Attached to agreement Audit No. A-57428 Lease L&T No. 13079

Between OREGON SHORT LINE RAILROAD COMPANY (Lessor)  
and THE HALLACK & HOWARD LUMBER CO. (Lessee)

Assignments - Date: - - - Name of assignee: - - -  
Date Name of assignee

Covering Log Loading Site A-57428-1

Location Banks, Idaho

Dated Mar. 3, 1941 Effective Date Mar. 1, 1944 Expiration (Original) Feb. 28, 1949

Expiration (by latest extension) - - -

Supplements, including extension riders: Dates - - -

IT IS HEREBY MUTUALLY AGREED by and between the present parties to the above named agreement that the term hereof shall be and is hereby extended to and including February 28, 1954, and that all the terms and conditions thereof as herebefore (if supplements to the original agreement are indicated above) or herein (if any special provisions are written hereon appended, shall remain in full force and effect during the extended term, said agreement with amendments and supplements (if any) to be subject to termination prior to the expiration of the extended term in the same manner as is provided therein for termination prior to the expiration of the term hereby extended.

Special Provisions: Effective with the beginning of the extension of the term hereby created, the original agreement, as amended or extended shall be and is hereby amended as set out on the reverse side hereof.

Date: November 15, 1948 Made in duplicate

Witness: 11

OREGON SHORT LINE RAILROAD COMPANY  
UNION PACIFIC RAILROAD COMPANY  
By \_\_\_\_\_  
General Manager

Witness:

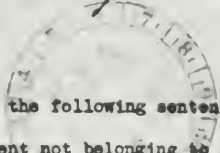
THE HALLACK & HOWARD LUMBER CO.  
BY De... ..  
Its President

Attest: \_\_\_\_\_  
Secretary



APPROVED: *W. H. Taylor*  
 APPROVED AS TO: *Benjamin P. Severick*  
 FORM *Benjamin P. Severick*  
 GEN'L. S. DIV. 1010  
*W. H. Taylor* EX. DIVISION *Benjamin P. Severick*  
 GENERAL LAND & TAX AGENT GEN'L. SOLICITOR G.

APPROVED  
*A. B. Beebe*  
 SUPERINTENDENT



Section 6 shall be amended by the addition thereto of the following sentence:

In the event any building or other improvement not belonging to the Lessor on the leased premises is damaged or destroyed by fire, storm or other casualty the Lessee shall, within thirty days after such happening, remove all debris and rubbish resulting therefrom; and if Lessee fails so to do Lessor may enter the leased premises and remove such debris and rubbish, and the Lessee agrees to reimburse the Lessor, within thirty days after bill rendered, for the expense so incurred.

Sections 16 and 17 shall be amended to read as follows:

J. B. M.

Section 16. This lease may be terminated by written notice given by either the Lessor or the Lessee to the other party on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given. Said notice may be given to the Lessee by serving the Lessee personally or by posting a copy thereof on the outside of any door in any building upon the leased premises or by mailing said notice, postage prepaid, to the Lessee at the last address known to the Lessor. Said notice may be given to the Lessor by mailing the same, postage prepaid, to the office of the General Manager of the District of the Lessor in which the leased premises are located. Upon such termination and vacation of the premises by the Lessee, the Lessor shall refund to the Lessee on a pro-rata basis, any unearned rental paid in advance.

Section 17. The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises upon the termination of the lease hereover. Within thirty days after such termination the Lessee shall (a) remove from the premises, at the expense of the Lessee, all structures and other property not belonging to the Lessor; and (b) restore the surface of the ground to as good condition as the same was in before such structures were erected, including among other things, the removal of foundations of such structures, the filling in of all excavations and pits and the removal of all debris and rubbish, all at the Lessee's expense, failing in which the Lessor may perform the work and the Lessee shall reimburse the Lessor for the cost thereof within thirty days after bill rendered.

In the case of the Lessee's failure to remove said structures and other property, the same shall, upon the expiration of said thirty days after the termination of this lease, become and thereafter remain the property of the Lessor; and if within ninety days after the expiration of such thirty-day period the Lessor elects to and does remove, or cause to be removed, said structures and other property from the leased premises and the market value thereof on removal or of the material therefrom does not equal the cost of such removal plus cost of restoring the surface of the ground as aforesaid, then the Lessee shall reimburse the Lessor for the deficit within thirty days after bill rendered.



cost of form  
imburse the

FORM 3808-A

Lease  
57428  
LAT No. 13079

No.

Audit No.

# LEASE

Date: **THIS AGREEMENT, made and entered into this 3rd day of March 1944,**  
Parties: **by and between OREGON SHORT LINE RAILROAD COMPANY**

a corporation of the State of Utah and its Lessee, UNION PACIFIC RAILROAD COMPANY, a corporation of the State of Utah (hereinafter collectively called "Lessor"), parties of the first part, and **THE HALLACK & HOWARD LUMBER CO., a corporation of the State of Colorado,**

(hereinafter called "Lessee"), party of the second part, WITNESSETH:

Section 1. The Lessor, for and in consideration of the covenants and payments hereinafter mentioned, to be performed and made by the Lessee, hereby agrees to lease and let and does hereby lease and let unto the Lessee for a term beginning on the 1st day of March 1944, and extending to the 28th day of FEBRUARY 1949, unless sooner terminated as herein provided.

Location: the portion of the premises of the Lessor at Banks Boise County, Idaho, shown outlined in yellow on the plat, or described in the description, or both, hereto attached and made a part hereof; RESERVING, however, to the Lessor the right to place and maintain at prominent places on the leased premises signs advertising Union Pacific Railroad Company.

Rental: Section 2. The Lessee agrees to pay for the use of said premises, rental at the rate of FIFTY-FIVE AND NO/100- Dollars (\$55.00-) per annually in advance. Acceptance of said rental in advance by the Lessor shall not act as a waiver of its right to terminate this lease as hereinafter provided. It is agreed that no improvements placed upon the leased premises by the Lessee shall become a part of the realty and the Lessee agrees to pay, before the same become delinquent, all taxes and all assessments levied and assessed during the continuance of this lease upon any buildings and other improvements placed upon the leased premises.

Use of Leased Premises: Section 3. The Lessee covenants that the leased premises shall not be used for any other purpose than for

--- Log Loading Site ---

Abandonment: the Lessee abandons the leased premises, the Lessor may enter upon and take possession of the same, and that a non-user for the purpose mentioned, continuing for thirty days shall be sufficient and conclusive evidence of such abandonment.

Lessee Not to Sublet or Assign: Section 4. The Lessee agrees not to let or sublet the leased premises, in whole or in part, or to assign this lease without the consent in writing of the Lessor, and it is agreed that any transfer or assignment of this lease, whether voluntary, by operation of law or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Lessor, shall terminate this lease.

Use for Unlawful Purposes Prohibited, Indemnity: Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purpose whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof.

Cure of Premises and Improvements: Section 6. The Lessee hereby covenants and agrees that any and all buildings erected upon the leased premises shall be painted by the Lessee a color satisfactory to the Lessor, and shall at all times be kept in good repair; that the roof of each such building shall be of fire-resistive material; that when such buildings are without solid foundation the openings between the ground and the floor thereof shall be covered with fire-resistive material; that the leased premises shall during the continuance of this lease be kept by the Lessee in a neat and tidy condition and free from all straw, rubbish, or other material which would tend to increase the risk of fire or give the leased premises an untidy appearance; that none of the buildings or other structures erected on said premises shall be used for displaying signs posters or any signs or advertisements other than such notices and signs as may be connected with the business of the Lessee, and that such signs and notices shall be neat and shall be properly maintained.





**Claims and  
Liens for  
Labor and  
Material.**

Section 7. The Lessee shall fully pay for all materials joined or affixed to said premises, and shall pay in full all persons who perform labor upon said premises, and shall not permit or suffer any mechanic or material-man's lien of any kind or nature to be enforced against said premises for any work done or materials furnished thereon at the instance or request or on behalf of the Lessee; and the Lessee agrees to indemnify and hold harmless the Lessor from and against any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

**Clearances.**

Section 8. No building, platform or other structure shall be erected or maintained and no material or obstruction of any kind or character shall be placed, piled, stored, stacked or maintained closer than eight (8) feet six (6) inches to the center line of the nearest track of the Lessor; PROVIDED, however, that in the case of platforms not higher than four (4) feet above the top of the rail a minimum clearance of seven (7) feet three (3) inches from the center line of the nearest track of the Lessor will be permitted; and PROVIDED further that along and adjacent to, and for one car length beyond, those portions of track having a curvature greater than ten (10) degrees the clearances heretofore provided shall, with reference to platforms, structures and other obstructions greater than four (4) feet in height shall be increased horizontally one (1) foot; and PROVIDED further that if by statute or order of competent public authority greater clearances shall be required than those provided for in this Section 8, then the Lessee shall strictly comply with such statute or order. All doors, windows or gates shall be of the sliding type or shall open toward the inside of the building or enclosure when such building or enclosure is so located that the said doors, windows or gates if opening outward, would, when opened, impair the clearances in this section prescribed.

**Explosives and  
Inflammables.**

Section 9. It is further agreed that no gunpowder, gasoline, dynamite, or other explosives or inflammable material shall be stored or kept upon the leased premises. Nothing herein contained, however, shall prevent the storage of oil or gasoline upon the leased premises when the purpose for which the same are to be used, as indicated by Section 3 hereof, contemplates such storage; nor the storage of oil or gasoline where same are used by the Lessee for fuel in the business carried on by the Lessee on the leased premises, and are stored in quantities reasonable for such purpose; PROVIDED, however, that in all of said excepted cases, the Lessee shall strictly comply with all statutory and municipal regulations relating to the storage of such commodities.

**No Constructions  
by Lessee  
Over or Under  
Tracks.**

Section 10. The Lessee shall not locate or permit the location or erection of any poles upon the property of the Lessor, nor of any beams, pipes, wires, structures or other obstruction over or under any tracks of the Lessor without the consent of the Lessor.

**Liability of  
Lessee for  
Breach.**

Section 11. The Lessee shall be liable for any and all injury or damage to persons or property, of whatsoever nature or kind, arising out of or contributed to by any breach in whole or in part of any covenant of this agreement.

**No Other  
Railroad to  
Use Tracks.**

Section 12. No railroad company other than the Lessor shall be allowed to use any track owned or built by the Lessor now or hereafter upon or extending to any part of the leased premises, without the permission in writing of the Lessor.

**Fire Damage  
Release.**

Section 13. It is understood by the parties hereto that the leased premises are in dangerous proximity to the tracks of the Lessor, and that by reason thereof there will be constant danger of injury and damage by fire, and the Lessee accepts this lease subject to such danger.

It is therefore agreed, as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumes all risk of loss, damage or destruction of or to buildings or contents on the leased premises, and of or to other property brought thereon by the Lessee or by any other person with the knowledge or consent of the Lessee and of or to property in proximity to the leased premises when connected with or incidental to the occupation thereof, and any incidental loss or injury to the business of the Lessee, where such loss, damage, destruction or injury is occasioned by fire caused by, or resulting from, the operation of the railroad of the Lessor, whether such fire be the result of defective engines, or of negligence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employe of the Lessor, or otherwise, and the Lessee hereby agrees to indemnify and hold harmless the Lessor from and against all liability, causes of action, claims, or demands which any person may hereafter assert, have, claim or claim to have, arising out of or by reason of any such loss, damage, destruction or injury, including any claim, cause of action or demand which any insurer of such buildings or other property may at any time assert, or undertake to assert, against the Lessor.

**Water  
Damage  
Release.**

Section 14. The Lessee hereby releases the Lessor from all liability for damage by water to the leased premises or to property thereon belonging to or in the custody or control of the Lessee, including buildings and contents, regardless of whether such damage be caused or contributed to by the position, location, construction or condition of the railroad, roadbed, tracks, bridges, dikes, ditches or other structures of the Lessor.

**Termination  
on Default.**

Section 15. It is further agreed that the breach of any covenant, stipulation or condition herein contained to be kept and performed by the Lessee, shall, at the option of the Lessor, forthwith work a termination of this lease, and all rights of the Lessee hereunder; that no notice of such termination or declaration of forfeiture shall be required, and the Lessor may at once re-enter upon the leased premises and repossess itself thereof and remove all persons therefrom or may resort to an action of forcible entry and detainer, or any other action to recover the same. A waiver by the Lessor of the breach by the Lessee of any covenant or condition of this lease shall not impair the right of the Lessor to avail itself of any subsequent breach thereof.

**Termination  
by Notice.**

Section 16. This lease may be terminated by written notice given by either the Lessor or the Lessee to the other party on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given. Said notice may be given to the Lessee by serving the Lessee personally or by posting a copy thereof on the outside of any door in any building upon the leased premises or by mailing said notice, postage prepaid, to the Lessee at the last address known to the Lessor. Said notice may be given to the Lessor by mailing the same, postage prepaid, to the office of the General Manager of the District of the Lessor in which the leased premises are located. Upon such termination and vacation of the premises by the Lessee, the Lessor shall refund to the Lessee on a pro rata basis any unearned rental paid in advance.

vacation of  
premises.  
Removed  
Lessor



the Lessor or Lessee, the

Vacation of Premises.

Section 17. The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises on the termination of this lease howsoever. Within thirty (30) days after the termination of this lease, the Lessee shall remove from the premises all structures and other property not belonging to the Lessor, and shall restore the surface of the ground to as good condition as the same was in before such structures were erected, all at the expense of the Lessee. In case of the Lessee's failure so to do, all such structures and other property shall, upon the termination of said thirty (30) days, become and thereafter remain the property of the Lessor.

Removal of Lessee's Property.

Special Provisions.

Lessor: <i>Carltonson</i> Carl E. Carlson <i>E. M. Moyer</i> E. M. Moyer	EXECUTIVE VICE PRESIDENT: <i>N. B. Thompson</i> N. B. Thompson EXECUTIVE VICE PRESIDENT: <i>A. B. [unclear]</i> A. B. [unclear]
--	--

APPROVED

SUPERINTENDENT

Successors and Assigns.

Section 18. It is further agreed that by the word "Lessee" is meant the party or parties of the second part herein and signing this agreement, and his, its, or their heirs, executors, administrators, successors or assigns, and that all of the terms and conditions of this agreement shall inure to the benefit of the Lessor, and the successors and assigns of the Lessor, or any railroad company whose line of railroad the Lessor may be operating under any arrangement of any kind or nature whatsoever.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed, the day and year first herein written.

OREGON SHORT LINE RAILROAD COMPANY

UNION PACIFIC RAILROAD COMPANY,

By *M. Leishman*

By *[Signature]*  
General Manager.

Witness: *L. J. Roach*

THE HALLACK & HOWARD LUMBER CO.

By *J. C. Colaren*  
Its *[Signature]*

Attest:  
*J. C. Colaren*  
Secretary



E. B. M.  
B. M.

3390  
3390+110 P.M. SW. 1/10 Sp. M.  
3390+110 P.M. SW. 1/10 Sp. M.

3392+101 Pole 50° Lt.  
1067' 1/4 Cr. 1/4

3392+89: Double 36"x77" Corr. 1" Pipe 11' B.B.R. Drain  
3393+00: Culvert Marker G426  
3393+00: F.F. Lease 285' Lt.

3393+88 Pole 39° Lt.

3395+65 Pole 30° Lt.

3396+56: 76" of 14 Corr. 1" Pipe G.3 B.B.R. L  
3397+175 Pole 48° Lt.  
3397+26: Culvert Marker No G4-E  
3397+48: 2 wire in 1/2 G.I.P. 27 B.B.R. Poles 165 RL & 53' Lt.  
3397+75.5 Pt. 10 Frog

3399+098 Pole 52° Lt.  
3399+187 B. Cor. Blq. 387 Lt.

3399+439 F.F. Stock Yards 46' Lt.  
3399+600 2" Riser 78' Lt.

3400

3400+035 F.F. Chute Prim 4 ATR

3400+609 2" Riser 75 Lt.  
3400+570 34" of 18" Corr. 1" Pipe 75 B.B.R. Dr.  
3400+624: Culvert Marker No G4-F  
3400+825 Pole 58° Lt.

1/4 Acre Platform 39' ATR

3402+156 5" 10' W.D.

3402+160 Pole 64° Lt.

3403+114 Pole 46° Lt.  
3403+190 Pt. 10 Frog

3403+545 3" X 12" X 16" Plank King

3404+055 Pt. of Switch

To Harp  
S. L. N. R. S. L. N. R.  
3392+023  
1067' 1/4 Cr. 1/4

Meander Line of River

River Bank

No 3  
To McCall  
TO LARREPORT  
ROAD  
No 3

3392+858 P.S.  
3392+858 P.S.  
3392+858 P.S.

3397+691 Wire enter R.M. 1000 RL

3400+589 FE Shelter over Pump 55' RL  
3400+600 & 2" G.I.P. 10' B.B.R.

O.S.L.R.R. Co.  
UNION PACIFIC RAILROAD CO. (LESSEE)  
Banks, Idaho  
Lease to Hallack & Howard Lumber Co.  
Scale: 1" = 100'  
Office of Chief Engineer  
Omaha, Nebr. Febr. 24, 1944  
\* LEGEND \*  
Lease outlined . . . . . Yellow  
RR right of way outlined . . . . . Red

Endorsed : Filed October 2, 1952.

13



[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant:

You are hereby summoned and required to serve upon Bryan P. Leverich, 10 South Main St., Salt Lake City, Utah, and L. H. Anderson, E. H. Casterlin, and E. C. Phoenix, P.O. Box 530, Pocatello Idaho, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 3, 1952.

[Seal] ED. M. BRYAN,  
Clerk of Court.

/s/ BILLIE BRYAN,  
Deputy Clerk.

Return on service of writ attached.

[Endorsed]: Filed October 10, 1952.

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[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant herein moves the Court as follows:

I.

To dismiss the above-entitled action upon the following grounds:

A? That the complaint as drawn fails to state

a claim against the Defendant upon which relief can be granted.

## II.

This Motion is made upon the records and files in this cause.

Dated this 24th day of October, 1952.

/s/ OSCAR W. WORTHWINE,  
Attorney for Defendant.

[Endorsed]: Filed October 28, 1952.

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated and Agreed By and between the Attorneys of Record for the Plaintiffs, and the Attorney for the Defendant in the above-entitled action as follows:

1. The Plaintiffs hereby waive any notice of a motion by the Defendant to bring in W. O. Bedal as a Third Party Defendant in this action.

2. The Plaintiffs hereby consent to the Court entering an order bringing in the said W. O. Bedal as a Third Party Defendant.

Dated this 27th day of October, 1952.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

Attorney for Defendant.

[Endorsed]: Filed October 28, 1952.



[Title of District Court and Cause.]

MINUTE ORDER—NOVEMBER 14, 1952

Comes now Oscar W. Worthwine into open Court and presents to the Court Motion and Order to bring in a Third Party Defendant. The Court being fully advised in the premises signed the Order as presented and ordered the same filed herein.

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[Title of District Court and Cause.]

MOTION TO BRING IN THIRD  
PARTY DEFENDANT

Defendant, The Hallack and Howard Lumber Company, a corporation, moves for leave to make W. O. Bedal, a citizen and resident of the State of Idaho, a Party to this action, and that there be served upon him Summons and Third Party Complaint as set forth in Exhibit "A" hereto attached.

Dated this 31st day of October, 1952.

/s/ OSCAR W. WORTHWINE,

Attorney for Defendant, The Hallack and Howard  
Lumber Company

## ORDER

Upon reading the foregoing Motion and good cause appearing therefor,

It Is Hereby Ordered That W. O. Bedal be made a party to this action, and that Summons and Third Party Complaint as attached to Defendant's Motion be served upon said Third Party Defendant, W. O. Bedal.

Dated this 14th day of November, 1952.

/s/ CHASE A. CLARK,  
District Judge.

EXHIBIT "A"

United States District Court for the District  
of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

THIRD PARTY COMPLAINT

First Count

I.

That the Plaintiffs, Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, have filed against the Defendant, The Hallack and Howard Lumber Company, a corporation, a complaint, a copy of which is attached hereto as Exhibit "C."

II.

That on or about March 31, 1945, the Defendant and Third Party Plaintiff, The Hallack and How-

ard Lumber Company, a corporation, as Party of the First Part, entered into a logging contract with Owen S. Smith and W. O. Bedal, as Parties of the Second Part, under the terms of which the said Third Party Defendant, W. O. Bedal, and the said Owen S. Smith agreed to cut and load certain logs upon railroad cars at Banks, Boise County, Idaho, and that by the Fifth Amendment to said logging contract dated the 7th day of May, 1949, the Third Party Defendant, W. O. Bedal, was substituted for and in the place of himself and the said Owen S. Smith, and assumed all of the obligations contained in said logging contract dated March 31, 1945. That a copy of said logging contract is hereto attached and marked Exhibit "D."

### III.

That under the terms and conditions of said logging contract it was stipulated and agreed as follows:

"It is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed

that this is what is commonly termed and called an independent contractor's agreement."

and said logging contract also provided:

"Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract."

#### IV.

That under the terms and provisions of said logging contract the said W. O. Bedal was at all times after May 7, 1949, an independent contractor having charge and control of the premises which were leased to the Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, and described in the complaint, a copy of which is hereto attached as Exhibit "C."

#### V.

That on or about the 15th day of September, 1949, while the aforesaid logging contract between The Hallack and Howard Lumber Company and the said W. O. Bedal was in full force and effect, while acting as an independent contractor, the Third Party Defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises at Banks, Boise County, Idaho, and that while so unloading said logs under the terms and conditions

of said logging contract between him and the said Defendant and Third Party Plaintiff, a piece of timber broke off one of the logs being so unloaded and struck one A. M. Powell, an employee of the Union Pacific Railroad Company, a corporation, seriously injuring the said A. M. Powell, and that as a result of said accident the judgment set forth and described in the complaint of the Plaintiffs herein was obtained against the Union Pacific Railroad Company at the time and in the manner set forth in the complaint herein, a copy of which is attached as Exhibit "C."

#### VI.

That by reason of said logging contract between the Defendant and Third Party Plaintiff and the said W. O. Bedal, Third Party Defendant, the said W. O. Bedal was, is, or may be, liable to the said Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, for any sums recovered against the said Defendant and Third Party Plaintiff by the Plaintiffs herein.

#### VII.

That this claim arises out of the transactions and occurrences that are the subject-matter of the original complaint on file herein, a copy of which is hereto attached as Exhibit "C."

#### VIII.

That this Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, does not believe that it is liable to the

Plaintiffs herein, but in the event the Plaintiffs, or either of them, recover a judgment or judgments against this Defendant and Third Party Plaintiff, that it will be entitled to a judgment or judgments against the Third Party Defendant, W. O. Bedal, for the total sum of said judgment or judgments.

IX.

That this Defendant and Third Party Plaintiff on October 14, 1952, by an instrument in writing, tendered the defense of this action to the said W. O. Bedal, and his insurance carrier, the Truck Insurance Exchange, and they severally refused to defend it; that a copy of said tender is attached hereto as Exhibit "E."

X.

That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.

That on April 25, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho,

Southern Division, referred to in the complaint of the Plaintiffs in this action.

That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

“This letter is to advise you that The Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless The Hallack and Howard Lumber Company from any liability whatever in this matter.”

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit “F,” and by this reference is hereby made a part hereof.

That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

That the said cause of A. M. Powell, Plaintiff,



versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951.

### Second Count

In the alternative, and as a second count, the Defendant and Third Party Plaintiff alleges:

#### I.

The Defendant and Third Party Plaintiff hereby incorporates by this reference all of the allegations contained in the above First Count.

#### II.

That if the Third Party Defendant is not liable to this Defendant and Third Party Plaintiff upon the above First Count, he is or may be liable to this Defendant and Third Party Plaintiff by way of subrogation and upon an implied contract based upon the following facts:

That the Third Party Defendant was an independent contractor for a long time prior to and on September 15, 1949, and he, his servants, agents and employees, had the exclusive charge and control of a log loading bunker at Banks, Boise County, Idaho, and that he, his servants, agents and employees, negligently permitted said log bunker to become filled with bark, limbs, dirt and other debris so that it would not properly stop logs rolled down an incline to the tracks of the Union Pacific Rail-

road Company, and negligently failed to remove from said logs the splinter that injured the said A. M. Powell, and that the Third Party Defendant's method of unloading logs from trucks down said incline, with splinters on them, was hazardous and dangerous to life and limb, and as a result of the said negligence of the Third Party Defendant, his servants, agents and employees, in so maintaining said log bunker and in unloading logs from his trucks on September 15, 1949, the said A. M. Powell was seriously injured, resulting in the judgment referred to and described in Plaintiff's complaint herein;

That at said time the said Third Party Defendant was not a servant, agent or employee of this Defendant and Third Party Plaintiff, and none of his employees were servants, agents or employees of this Defendant and Third Party Plaintiff; that this Defendant and Third Party Plaintiff had no part in the unloading of the said log or logs that caused the injury to the said A. M. Powell, and in no way, directly or indirectly, contributed to said injuries. That the said negligence of the Third Party Defendant, his servants, agents and employees, was the active, direct, proximate and primary cause of the injuries to the said A. M. Powell.

Wherefore, This Defendant and Third Party Plaintiff prays:

First, for judgment against the Third Party Defendant, W. O. Bedal, for any and all amounts for which judgment may be entered against it;

Second, for attorneys fees and costs expended by this Defendant and Third Party Plaintiff.

/s/ OSCAR W. WORTHWINE,  
Attorney for Defendant and  
Third Party Plaintiff.

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EXHIBIT C

[Exhibit C attached is identical to Complaint Cause No. 2944 see page 3 of this printed record.]

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EXHIBIT "D"

LOGGING CONTRACT

This Agreement, made and entered into this 31st day of March, 1945, by and between The Hallack & Howard Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado and authorized to do business in the State of Idaho, party of the first part, and Oliver Bedal and Owen S. Smith of Council, Idaho, parties of the second part, Witnesseth:

That in consideration of One Dollar (\$1.00), paid by one to the other, receipt of which is hereby acknowledged, and other good and valuable considerations as hereinafter mentioned, the parties of the second part, contracts and agrees with the party of the first part as follows:

The parties of the second part agree to cut, skid, haul, and deliver to the railroad at Banks, Idaho.

## Exhibit "D"—(Continued)

what is known as the Banks landing, and load on railroad cars all of the timber the party of the first part has now purchased from the United States Forest Service, what is known as the Danskin area, and the remaining small amount of timber now cut in what is known as the Big Pine area, amounting to about Fifteen (15) Million Feet more or less.

The timber now owned by the party of the first part is more specifically described as the timber purchased from the United States Forest Service located in Sections 13-14-22-23-24-25-26-27-34-35 and 36, Township 9 North, Range 5 East, and Sections 18 and 19, Township 9, Range 6 East.

It is also agreed that the parties of the second part agree to unload from the trucks and reload all the logs delivered to Banks, Idaho, landing which may be delivered by Logan Wakefield, logging contractor, or any other party who may deliver logs to Banks, Idaho, and for such logs the parties of the second part load on cars; it is agreed that the price paid by the party of the first part will be One Dollar (\$1.00) per M for all such work.

It is understood by this contract that the party of the first part agrees to be responsible for the disposal of brush and slashing of all the timber cut under this contract.

The Second parties agree to begin the necessary repairing of equipment, securing a crew of employees, building roads and falling of timber possible, and doing all necessary work possible during the winter and spring months in order to have suffi-

Exhibit "D"—(Continued)

cient logs and roads ahead to carry on a continuous delivery of logs to Banks, Idaho, as soon as the logging trucks can be operated.

The parties of the second part agree to deliver to the Banks land not less than Eighty (80) Thousand Feet of logs per day or about Two (2) Million per month and it is also agreed by both parties of this contract that the party of the first part will accept any additional logs the second parties are able to deliver per day or per month.

It is also agreed that in case logs cannot be delivered to the log pond or at the Banks landing during the winter months, the parties of the second part may continue delivering logs, decking same, but no additional compensation shall be paid for such logs so delivered and decked.

It is agreed that the price to be paid by the party of the first part to the parties of the second part for said log delivery at the Banks landing and loaded on railroad cars by the parties of the second part under the terms of this Agreement is to be Fifteen Dollars (\$15.00) per M, which price is hereby agreed to be the full and complete compensation payable by the party of the first part to the parties of the second part for all of their services covering the entire operation from the cutting of the timber to the landing and loading of logs on railroad cars at Banks, Idaho.

Payments under this contract shall be made by the party of the first part to the parties of the second part for all log delivery to the Banks landing and loading on railroad cars during each month.

## Exhibit "D"—(Continued)

such payment to be made on the 15th day of the following month.

The scaling of logs under this contract shall be performed by a representative of the first party at the time of the delivery at the Banks landing. The scaling used shall be the Decimal C System, the same as is used by the United States Forest Service in scaling logs under its contract with the party of the first part.

Second parties agree that they will keep a check scale and a log count of the logs cut and delivered by them to the first party and that they will at least once each week check their scale and log count with that of the scaler of the first party to the end that there can be no variations in the scale and count kept by the second parties and that kept by the first party except such variations that is commonly known to exist between two or more different scalers and that the second parties shall at once advise the manager of the first party at Cascade, Idaho, of any claim or variations in the second parties' scale and count with that of the scaler of the first party and that unless second parties file a written statement with the said manager of the first party of their claim of variations within ten (10) days after the expiration of any week in which they claim there was a variation, they shall be conclusively deemed to have waived any claim of under scaling or count by the scaler of the first part.

It is agreed that the first party hereby reserves the right, and has the right, in case of bad market-

Exhibit "D"—(Continued)

ing conditions or control of production by any government agency, or for any other cause or reason beyond the control of the party of the first part, to notify the second parties to discontinue logging operations temporarily at any time during the continuance of this contract. It is further provided that the second parties shall be given thirty (30) days' notice before ceasing their operations and that they will be given the same notice in advance of resuming operations under this contract.

It is agreed that the party of the first part will sell the parties of the second part any and all logging equipment needed by the parties of the second part of any extra or surplus equipment owned by the party of the first part at a fair and reasonable price, and the parties of the second part agree to give the party of the first part their note and mortgage covering the security of any equipment purchased.

The parties of the second part agree to pay the first party One Dollar and Fifty Cents (\$1.50) per M of all logs delivered each month as payment on the purchase of such equipment and it is also agreed that the parties of the second part have a right to pay off any balance due for the equipment at their option.

It is agreed by the parties of the second part that in the event this contract is not carried through to completion and the parties of the second part should decide to resell any or all of the equipment they have in their possession purchased from the party of the first part that they will guarantee that all

## Exhibit "D"—(Continued)

of such equipment will be in as good a condition as when the party of the first part sold the equipment to the parties of the second part.

The first party hereby agrees to furnish second parties upon request any lumber that they may need for the building of camp or camps or for use in their logging operation at wholesale price for the various kinds of grades used, and it is agreed that by wholesale price is meant the price at which it sells lumber at wholesale to the retail yard of the Boise Payette Lumber Company at Cascade, Idaho.

Second parties agree that all of their logging operations under this contract shall be under the direction of first party, depending on the necessity caused by weather conditions, and that subject to governing weather conditions they will operate first in that part of the timber which is an average of the entire tract so far as difficulty of expense and operation is concerned, and that such cutting as to location shall be performed under the instructions and guidance of the first party.

Second parties agree that during the months of June, July and August while there is danger of sap stain, the timber shall be felled only so fast as it is moved to the landing, and that under no circumstances will timber be allowed to remain on the ground after felling without being rolled out and decked when necessary so as to avoid any possibility of sap stain. It is further agreed that all logs shall be cut in such lengths as is required and directed by the first party. It is hereby agreed that the avoidance of sap stain and the cutting of logs in



## Exhibit "D"—(Continued)

such lengths as is directed by first party is of great importance to the first party and will be fully and carefully complied with by the second parties.

It is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement.

The parties of the second part agree to procure in a manner satisfactory to the officers of the State of Idaho having charge of the administration of the Workmen's Compensation Act, workmen's compensation for all of his employees to be employed in said logging operations, and also to comply fully with all federal and state laws, rules and regulations regarding compensation of employees.

The parties of the second part agree to furnish at any time upon the request of the first party, their time books, books of account, receipted bills, vouchers, checks, and all other and full and complete information concerning the employment of labor, the purchase of equipment, and the carrying on of work under this contract, as well as to give

## Exhibit "D"—(Continued)

to the party of the first part full and complete information as to their financial condition and the progress made by the second parties in the discharge of all of their financial obligations in regard to the cutting, hauling and delivery of said logs and all of the other terms of this contract, and second parties agree to fully and completely advise the first party as to the possibility and/or probability of any claims of indebtedness against said parties of the second part becoming a lien upon said logs. The parties of the second part hereby grant and give to the party of the first part the full and complete right to inspect said books, vouchers, checks and accounts in order to ascertain the amount due and which may become due to any person whatsoever on account of second parties being engaged in said logging operations.

Second parties agree that all logging operations shall be performed as to fire protection strictly under the rules in effect, or to be put into effect, by the United States Forest Service, and under any rules, regulations or requirements of the State of Idaho, and the second parties agree at their own expense to provide their trucks with fire fighting equipment when necessary to comply with any rules or regulations of any governmental body, and to furnish men for fire fighting whenever required by any rules, regulations, or the officers of any governmental body, and the second parties hereby agree to compensate said first party for any loss or damage caused by fire or otherwise by any of their employees.

Exhibit "D"—(Continued)

Second parties also agree to comply in every respect with any and all requirements as to wages, hours of employment of labor, and any and all other regulations which now are or hereafter may be promulgated by the United States or the State of Idaho, or any legal subdivision of either, or by any governmental agency or bureau. Second parties agree to comply with the laws and regulations set up or hereafter to be set up by the Social Security Board under either state or federal laws, rules or regulations, and further agree to assume all responsibility for taxes, fees, charges and workmen's compensation premiums on labor under all Social Security laws. Second parties hereby agree that any and all subcontractors employed by them shall be required to comply strictly with all the requirements in this contract, including those relating to all the rules and regulations of the United States and/or the State of Idaho and any and all agencies and bureaus of the United States and/or the State of Idaho.

Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use, and will at their own expense provide each truck with all equipment for safe opera-

## Exhibit "D"—(Continued)

tion and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof.

Second parties further agree to do all necessary work in building roads and bridges and keeping roads in repair; it being understood however, that the first party is to stand such expense as may be necessary to secure rights-of-way over privately owned lands between the present existing roads and the timber; it being agreed, however, that second parties shall not incur or contract for any expense in procuring rights-of-way without first consulting with the Superintendent of the party of the first part and securing the permission of the party of the first part.

No assignment of this contract shall be valid without the written consent of both parties hereto.

It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second part in the time and in the manner and in the method hereinbefore specified is of great importance to the first party, and in the event of the failure of the parties of the second part to perform any of the terms of this contract by them to be performed, the party of the first part shall have the right at its option, by written notice to the parties of the second part, to terminate this contract within thirty (30) days.

In Witness Whereof, the parties have hereunto

Exhibit "D"—(Continued)

set their hands and seals the day and year first above written.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation,

By /s/ G. DOWNER,

Vice-Pres.,

Party of the First Part.

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL,

Parties of the Second Part.

Witness:

/s/ U. R. ARMSTRONG,

/s/ L. A. McMILLAN.

AMENDMENT TO LOGGING CONTRACT

The following is an amendment to now existing logging contract between The Hallack & Howard Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado and authorized to do business in the State of Idaho, party of the first part, and Oliver Bedal and Owen S. Smith of Council, Idaho, parties of the second part.

The fifth paragraph, counting from the top of page 2, is amended to read as follows:

It is agreed that the price to be paid by the party of the first part to the parties of the second part for said logs delivery at the Banks landing and loaded on railroad cars by the

## Exhibit "D"—(Continued)

parties of the second part under the terms of this agreement is to be Seventeen Dollars (\$17.00) per M, which price is hereby agreed to be the full and complete compensation payable by the party of the first part to the parties of the second part for all of their services covering the entire operation from the cutting of the timber to the landing and loading of logs on railroad cars at Banks, Idaho.

The third paragraph counting from the top of page 3, is amended to read as follows:

It is agreed that the first party hereby reserves the right, and has the right, in case of bad marketing conditions or control of production by any government agency, or for any other cause or reason beyond the control of the party of the first part, to notify the second parties to discontinue logging operations temporarily at any time during the continuance of this contract. It is further provided that the second parties shall be given ten (10) days' notice before ceasing their operations and that they will be given the same notice in advance of resuming operations under this contract.

The second paragraph counting from the top of page 4, is amended to read as follows:

The parties of the second part agree to pay the first party Two Dollars and Fifty Cents (\$2.50) per M of all logs delivered each month as payment on the purchase of such equipment

Exhibit "D"—(Continued)

and it is also agreed that the parties of the second part have a right to pay off any balance due for the equipment at their option.

The first paragraph counting from the top of page 8, is amended to read as follows:

It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second party in the time and in the manner and in the method hereinbefore specified is of great importance to the first party, and in the event of the failure of the parties of the second part to perform any of the terms of this contract by them to be performed, the party of the first part shall have the right at its option, by written notice to the parties of the second part, to terminate this contract within ten (10) days.

This amendment to become effective as of September 1, 1945, and to apply to the Danskin Creek area only.

In Witness Whereof, the parties have hereunto set their hands and seals this 29th day of Sept., 1945 A.D.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation.

By /s/ J. F. DOWNER,

Vice-Pres.,

Party of the First Part.

/s/ OWEN S. SMITH,

Exhibit "D"—(Continued)

/s/ W. O. BEDAL,

Parties of the Second Part.

Witness:

/s/ U. R. ARMSTRONG.

## Amendment to an Amendment

The following is an amendment to an amendment to a now existing contract dated 31st day of March, 1945, and amendment dated the 29th day of September, 1945, between the Hallack & Howard Lumber Company, a corporation organized and authorized to do business in the State of Idaho, party of the first part, and Owen S. Smith and W. O. Bedal now of Garden Valley, Idaho, parties of the second part:

The parties of the second part agree to cut, skid, haul and deliver to the railroad at Banks, Idaho, which is known as the Banks landing, and load on railroad cars all of the timber the party of the first part now has purchased or contracted from the United States Forest Service, what is known as the Bunch Creek, Horn Creek and Wash Creek area estimated to be ten (10) million feet more or less.

The timber purchased or now contracted by the party of the first part is more specifically described as in Sections 1-12-13-14 and 24, Township 8 North, Range 4 East, and Sections 7-8-17-18-19-20 and 30, Township 8 North, Range 5 East.

The parties of the second part also agree to cut, skid, haul and deliver to the railroad at Banks, Idaho, and load on cars any other timber that may be contracted or purchased by the party of the first



Exhibit "D"—(Continued)

part in that same locality which is about the average logging condition.

It is agreed the parties of the second part are to pay all cost of moving and building camp, building of roads, culverts and bridges and any and all other costs with the exception of paying the cost and securing logging road right-of-way which the party of the first part agrees to pay.

The price to be paid by the party of the first part to the parties of the second part for the entire logging operation from tree to the loading of logs on cars at Banks, Idaho, is to be Seventeen Dollars (\$17.00) per M.

It is understood logging operations will be permitted to start in Bunch, Horn and Wash Creeks area just as soon as the present Danskin Creek contract is completed to the entire satisfaction of the party of the first part and the United States Forest.

Aside from the above changes, all other provisions of the now existing contract known as the Danskin area contract dated March 31, 1945, and the amendment dated September 29, 1945, are to remain exactly the same.

In Witness Whereof, the parties have hereunto set their hands and seals this 14th day of December, 1945.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation.

By /s/ U. R. ARMSTRONG,

Manager, Party of the First  
Part.

Exhibit "D"—(Continued)

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL,

Parties of the Second Part.

Witness:

/s/ O. M. CARLSON,

/s/ J. A. HOOD.

Third Amendment to Existing  
Logging Contract

The following is a third amendment to a now existing contract dated 31st day of March, 1945, amendment dated the 29th day of September, 1945, and amendment dated the 14th day of December, 1945, between the Hallack & Howard Lumber Company, a corporation organized and authorized to do business in the State of Idaho, party of the first part, and Owen S. Smith and W. O. Bedal, now of Garden Valley, Idaho, parties of the second part:

The parties of the second part agree to cut, skid, haul and deliver to the Railroad at Banks, Idaho, which is known as the Banks landing, and load on railroad cars all of the timber the party of the first part now has purchased or contracted from the United States Forest Service, known as the Scriver Creek and Six Mile Creek timber tract estimated to be Seventeen (17) Million feet more or less.

The timber under contract and to be cut, skidded, hauled and loaded on cars is to be all species marked by the U. S. Forest Service for cutting.

The timber purchased or now under contract by

Exhibit "D"—(Continued)

the party of the first part is more specifically described as in Sections 5-6-7-9-17-18-19-20 and 30, Twp. 10 N., Range 4 East; Sections 27-28-29-31-32-33 and 34, Twp. 11 North, Range 4 East, all in the Scriver Creek drainage, and Sections 10-11-12-13-14-15 and 22, Twp. 11 N., Range 4 East; Sections 7 & 18, Twp. 11 North, Range 5 East. All in Six Mile Creek drainage.

In addition to the above-described areas this contract also covers any timber outside the sale boundary agreed upon to take between the parties of the second part and the U. S. Forest Officer in charge.

The parties of the second part also agree to cut, skid, haul and deliver to the Banks landing and load on cars any other timber that may be contracted or purchased by the party of the first part in that same locality which is of about the average logging condition.

The price to be paid by the party of the first part to the parties of the second parties for the entire logging operation from tree to the loading of logs on the railroad cars at Banks, Idaho, is to be Nineteen Dollars (\$19.00) per M.

It is understood logging operations will be permitted to start in Scriver Creek and Six Mile Creek area just as soon as the present contract on Bunch, Horn and Wash Creeks is completed to the entire satisfaction of the party of the first part and the United States Forest Service.

Aside from the above changes, all other provisions of the now existing contract dated March

## Exhibit "D"—(Continued)

14th, 1945, are to remain exactly the same.  
and amendment to amendment dated December  
31st, 1945, amendment dated September 29th, 1945,

Witness Whereof, the parties have hereunto set  
their hands and seal this . . . . . day of February,  
1947.

THE HALLACK & HOWARD LUMBER CO., a  
Corporation.

/s/ U. R. ARMSTRONG,  
Manager,  
Party of the First Part.

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL.

Witness:

/s/ W. H. PATTERSON,

/s/ J. L. WILLIAMS,

/s/ H. N. SMITH,

/s/ JOEL R. FISHER.

FOURTH AMENDMENT TO EXISTING LOGGING CONTRACT

The following is a FOURTH amendment to a now existing contract dated March 31, 1945; amended September 29, 1945; amended December 14, 1945; and amended February 24, 1947, between THE HALLACK AND HOWARD LUMBER COMPANY, a corporation organized and authorized to do business in the State of Idaho, party of the First part, and Owen S. Smith and W. O. Bedal, of Crouch, Idaho, parties of the second part; WITNESSETH:

The seventh or last paragraph from the top of page 1 of the ~~CONTRACT~~ AMENDMENT is hereby amended to read as follows:

The price to be paid by the party of the first part to the parties of the second part for the entire logging operation from tree to the loading of logs ~~at the mill~~ at Banks, Idaho is to be TWENTY AND NO/100 DOLLARS (\$20.00) per M., for the year 1948.

This amendment is to become effective with the start of the 1948 logging season and to apply for the year 1948.

IN WITNESS WHEREOF, the parties have hereunto set their hands and this 27<sup>th</sup> day of July 1948.

THE HALLACK AND HOWARD LUMBER COMPANY  
by [Signature]  
Party of the First Part

[Signature]  
W O Bedal } Parties of Second Part

[Signature]  
Owen S. Smith



Exhibit "D"—(Continued)

Fifth Amendment to Existing  
Logging Contract

Whereas, the above and foregoing Logging Contract dated the 31st day of March, 1945, by and between the Hallack & Howard Lumber Company, a corporation, as Party of the First Part, and Oliver Bedal and Owen S. Smith, as Parties of the Second Part, has been amended from time to time; and

Whereas, the Partnership heretofore existing between Oliver Bedal (W. O. Bedal) and Owen S. Smith has been dissolved, and it is desired that the above and foregoing logging contract and all of the amendments thereto be carried on and completed by W. O. Bedal;

Now, Therefore, for and in consideration of the premises, it is hereby agreed by and between the Parties hereto as follows:

I.

That W. O. Bedal shall be substituted for and in the place of himself and the said Owen S. Smith, and that the said Owen S. Smith shall have no further interest in and to the above and foregoing contract and all amendments thereto, and that the said W. O. Bedal shall continue under said contract and amendments, and discharge all the duties heretofore performed by him and the said Owen S. Smith, and the said Owen S. Smith shall be released

## Exhibit "D"—(Continued)

from any and all further liability under said contract and all amendments thereto.

## II.

It is further agreed that any and all payments hereafter made under said contract and amendments shall be made to the said W. O. Bedal individually, and that the said Owen S. Smith shall have no interest in said payments and no interest in said contract or any amendments thereto.

In Witness Whereof, the Parties hereto have hereunto set their hands and seals the 7th day of May, 1949.

HALLACK & HOWARD  
LUMBER COMPANY,

By /s/ U. R. ARMSTRONG,

/s/ W. O. BEDAL,

/s/ OWEN S. SMITH.

Witnesses:

/s/ JEROME A. REININGER,

/s/ H. H. PRESTEL.



EXHIBIT "E"

Oscar W. Worthwine  
Attorney and Counselor  
Idaho Building

October 14, 1952.

Mr. Wm. O. Bedal  
Crouch, Idaho  
and  
Truck Insurance Exchange  
2229 State Street  
Boise, Idaho

Dear Sirs:

Re: Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, vs. The Hallack and Howard Lumber Company, a corporation. No. 2944.

This is to advise you, and each of you, that the Union Pacific Railroad Company, a corporation, and the Oregon Short Line Railroad Company, a corporation, has commenced an action in the United States District Court, for the District of Idaho, Southern Division, against The Hallack and Howard Lumber Company, a corporation, and the Summons in said case was served on October 8, 1952.

I am attaching hereto a copy of the complaint to which no answer has as yet been filed by the Defendant, The Hallack and Howard Lumber Company.

As you know The Hallack and Howard Lumber Company was in no way responsible for the injuries suffered by A. M. Powell, at Banks, Boise County, Idaho, on September 15, 1949.

Under date of January 10, 1951, The Hallack and Howard Lumber Company advised Wm. O. Bedal of the pendency of the action by A. M. Powell and the demand by the Union Pacific Railroad Company that we defend that action and that the Union Pacific Railroad Company would attempt to compel The Hallack and Howard Lumber Company to pay any judgment entered against it in that action.

As you know by virtue of the logging contract entered into between The Hallack and Howard Lumber Company and Wm. O. Bedal and Owen S. Smith under date of March 31st, 1945, as amended on various occasions, and which Wm. O. Bedal assumed individually by the fifth amendment to said contract dated May 7, 1949, The Hallack and Howard Lumber Company was to be held harmless from any claims arising on account of the operations of Wm. O. Bedal, and in which contract Wm. O. Bedal further agreed that all trucks and drivers were to be covered by insurance to take care of public liability and property damage, such insurance to specifically name and protect The Hallack and Howard Lumber Company in case of possible accident involving persons or property not connected with or owned by the parties to the contract.

We have been advised by an Agent of the Truck

Insurance Exchange that the said Truck Insurance Exchange had issued to Wm. O. Bedal a Comprehensive General Liability Policy of insurance and that The Hallack and Howard Lumber Company was fully protected, and that Wm. O. Bedal and The Hallack and Howard Lumber Company was fully covered and protected on September 15, 1949, when A. M. Powell was injured.

This letter is to advise you, and each of you, that The Hallack and Howard Lumber Company hereby tenders to you, and each of you, the defense of the present pending action, and demands that you, and each of you, hold it harmless on account of said action, and that you, and each of you, appear in and defend the action now pending in the United States District Court, for the District of Idaho, Southern Division, as between the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, Plaintiffs, against The Hallack and Howard Lumber Company, Defendant.

That an appearance must be made within twenty (20) days from October 8th, 1952.

Yours very truly,

THE HALLACK AND  
HOWARD LUMBER CO.

By /s/ OSCAR W. WORTHWINE,  
Its Attorney.

OWW :dw

encls

## EXHIBIT "F"

Registered Mail  
Return Receipt Requested.

January 10, 1951.

Mr. W. Oliver Bedal  
Crouch,  
Idaho

Dear Mr. Bedal:

We enclose a copy of a Complaint in the case of A. M. Powell vs. Union Pacific Railroad Company, being No. 2776 on the docket of the United States District Court for the District of Idaho, Southern Division, for judgment against said Railroad in the sum of \$45,000.00 for injuries sustained by Plaintiff as the result of being struck by a log at the log bunker near Banks, Idaho.

The Hallack and Howard Lumber Company has been advised by the Railroad Company that it will hold the Lumber Company liable under the terms of a Leasehold Agreement between the Railroad and The Hallack and Howard Lumber Company of the log loading site on which the log bunker referred to is located.

As you know, by virtue of the logging contract entered into between The Hallack and Howard Lumber Company, yourself and Owen S. Smith dated March 31, 1945, as amended on various occasions, and which you assumed individually by a Fifth Amendment to said logging contract dated

May 7, 1949, The Hallack and Howard Lumber Company was to be held harmless for any claims whatsoever incurred by you, your agents, servants, employees, etc., and further you agreed that all trucks and drivers were to be covered by insurance to take care of public liability and property damage, such insurance to specifically name and protect The Hallack and Howard Lumber Company in case of possible accident involving persons or property not connected with or owned by the parties to this contract. We understand that you did carry liability insurance as called for by the logging contract.

This letter is to advise you that The Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless The Hallack and Howard Lumber Company from any liability whatsoever in this matter.

We will appreciate it if you will advise us as to the liability insurance carried by you, the amount and the name of the insurance carrier.

Very truly yours,

PHELPS & PHELPS,

By HORACE F. PHELPS.

HFP:J

[Endorsed]: Filed November 14, 1952.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Idaho,  
County of Ada—ss.

D. O. Wilcox, Being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of twenty-one years, and that she is a Clerk and Secretary employed at Boise, Idaho, by Oscar W. Worthwine, Attorney at law; that upon the 14th day of November, 1952, at the request of said Oscar W. Worthwine she deposited in the United States Post Office at Boise, Idaho, postage prepaid, Motion and Order to bring in W. O. Bedal as a Third-Party Defendant in the above-captioned matter, together with Summons and Third Party Complaint to:

L. H. Anderson,  
Attorney at Law,  
312 Carlson Building,  
P O Box 530,  
Pocatello, Idaho.

and that said envelope containing said documents was securely sealed and had sufficient postage thereon to carry the same to the above-named person at his address in Pocatello, Idaho, and that there is a United States mail route from Boise, Idaho, to said Pocatello, Idaho.

/s/ D. O. WILCOX.

Subscribed and Sworn to before me this 14th day of November, 1952.

[Seal]      /s/ RANDALL WALLIS,  
Notary Public for Idaho.

[Endorsed]: Filed November 18, 1952.

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[Title of District Court and Cause.]

### SUMMONS

To the Above-Named Third-Party Defendant:

You are Hereby Summoned and required to serve upon Bryan P. Leverich, 10 South Main Street, Salt Lake City, Utah, and L. H. Anderson, E. H. Casterline and E. C. Phoenix, 312 Carlson Building, P. O. Box 530, Pocatello, Idaho, Attorneys for Plaintiffs, and Oscar W. Worthwine, 401 Idaho Building, P. O. Box 737, Boise, Idaho, Attorney for Defendant and Third-Party Plaintiff, an Answer to the Third Party Complaint which is herewith served upon you, and an Answer to the Complaint of the Plaintiffs, a copy of which is herewith served upon you, within twenty (20) days after the service of this Summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Third Party Complaint.

[Seal]      /s/ ED M. BRYAN,  
Clerk of the Court.

By /s/ BILLIE BRYAN,  
Deputy.

Dated November 14, 1952.

Return on Service of Writ attached.

[Endorsed]: Filed November 25, 1952.

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[Title of District Court and Cause.]

MOTION TO DISMISS ORIGINAL  
COMPLAINT

Comes Now the third-party defendant and moves  
the Court as follows:

I.

To dismiss the complaint insofar as third-party  
defendant is concerned, upon the following ground:

A. That said complaint fails to state a claim  
against the third-party defendant upon which re-  
lief can be granted.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Service and receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.



[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

Comes Now third party defendant and makes this motion for a more definite statement in the following particulars, to wit:

That in the first count of third party complaint, in Paragraph II thereof, it cannot be determined whether or not the negligence alleged consisted in permitting the log bunker to become filled with bark, limbs, dirt and other debris, or whether the negligence complained of consisted of failing to remove splinters from the logs, or whether the negligence complained of was the method of unloading the logs.

That third party defendant therefore moves for a more definite statement with reference to said acts of negligence.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION TO STRIKE

Third party defendant moves the Court that the first count of the third party complaint be stricken, on the ground that the same is not a proper proceeding in connection with the main suit herein and does not set forth facts which are material and pertinent as a third party action.

Third party defendant further moves the Court that the second count of the third party complaint be stricken, on the ground that the same is not a proper proceeding in connection with the main suit herein and does not set forth facts which are material and pertinent as a third party action.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the third-party defendant, and moves the Court as follows:

I.

To dismiss the first count of the third party complaint upon the following ground:

A. That said first count of said third party complaint fails to state a claim against the third party defendant upon which relief can be granted.

Third party defendant also moves the Court as follows:

I.

To dismiss the second count of the third party complaint upon the following ground:

A. That said second count of said third party complaint fails to state a claim against the third party defendant upon which relief can be granted.

This motion is made upon the records and files in this cause.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

### STIPULATION

It is Hereby Stipulated by and between Plaintiffs, the Defendant and Third-Party Plaintiff, and the Third-Party Defendant that the Defendant and Third-Party Plaintiff shall immediately file their Brief on the Motions now pending and that the Third-Party Defendant shall have thirty (30) days from this date within which to file his brief, and that the Plaintiffs shall have twenty (20) days thereafter within which to file and serve their brief.

Dated: February 25, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

Attorney for Defendant and  
Third-Party Plaintiff.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

Attorney for Third-Party  
Defendant.

ORDER

Pursuant to the foregoing Stipulation, it is Hereby Ordered that Defendant and Third-Party Plaintiff shall immediately file their Brief on the motions now pending, and that Third-Party Defendant shall have thirty (30) days from this date within which to file his brief, and that Plaintiffs shall have twenty (20) days thereafter within which to file and serve their brief.

Dated: February 27th, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed February 27, 1953.

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[Title of District Court and Cause.]

AMENDMENT TO THIRD-PARTY  
COMPLAINT

Comes Now, The Hallack and Howard Lumber Company, a corporation, the Third-Party Plaintiff herein, and before any responsive pleading has been filed to its Third-Party Complaint and amends its Third-Party Complaint on file herein by adding thereto a new paragraph to the First Count in said Third-Party Complaint, the same to follow Paragraph IX, said new Paragraph being numbered "X," and on pages numbered 4-a and 4-b; that said amendment is hereto attached.

Dated this 1st day of April, 1953.

/s/ OSCAR W. WORTHWINE,  
Attorney for Defendant and  
Third-Party Plaintiff.

X.

That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.

That on April 25, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho, Southern Division, referred to in the complaint of the Plaintiffs in this action.

That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner

notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

“This letter is to advise you that the Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack and Howard Lumber Company from any liability whatever in this matter.”

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit “F,” and by this reference is hereby made a part hereof.

That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

That the said cause of A. M. Powell, Plaintiff, versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951.

## EXHIBIT F

[Exhibit F attached is identical to Exhibit F attached to Exhibit A of the Motion to Bring in Third Party Defendant; see page 52 of this printed record.]

Acknowledgment of service attached.

[Endorsed]: Filed April 1, 1953.

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[Title of District Court and Cause.]

## STIPULATION

It is Stipulated by and between plaintiffs, defendant and third party plaintiff, and third party defendant, that the motions which have heretofore been made by third party defendant shall apply to the third party complaint, as amended.

It is Further Stipulated that the parties may have additional time to file briefs as follows:

Third party plaintiff twenty (20) days from the date hereof, and third party defendant twenty (20) days after receipt of brief from third party plaintiff; plaintiffs twenty days thereafter.

Dated: April 6, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.



/s/ OSCAR W. WORTHWINE,  
Attorney for Defendant and  
Third-Party Plaintiff.

/s/ CARL P. BURKE,

/s/ CARL A. BURKE,

/s/ LAUREL ELAM,

/s/ FRED TAYLOR,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed April 7, 1953.

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[Title of District Court and Cause.]

#### MINUTE ORDER—APRIL 8, 1953

Upon stipulation of counsel and the Court being advised, it is ordered that the third party plaintiff have 20 days from this date to file their brief, the third party defendant the 20 days following, to file their brief and the plaintiffs the 20 days thereafter to file their brief.

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[Title of District Court and Cause.]

#### ORDER

This cause is before the Court upon the Third Party Defendant's Motion to Strike, Motion to Dismiss, and Motion for More Definite Statement. This matter having been fully presented to the Court by

numerous briefs presented by respective counsel, and the court having considered the same,

It is the opinion of the Court that the Motion to Dismiss and the Motion to Strike should be denied. It is further the opinion of the Court that there being other ways to obtain the information desired, the Motion for a More Definite Statement should be denied.

Now, Therefore, It Is Hereby Ordered that the Motion to Dismiss, the Motion to Strike, and the Motion for More Definite Statement be and the same hereby are denied.

Dated this 22nd day of July, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed July 22, 1953.

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[Title of District Court and Cause.]

### ORDER

This Cause is before the Court upon the Third Party Defendant's Motion to Dismiss the Original Complaint and further upon Defendant's Motion to Dismiss the Original Complaint and having been fully presented to the Court by respective counsel and the Court having considered the same;

It is the opinion of the Court that the Motion of the Third Party Defendant to Dismiss the Original Complaint and the Defendant's Motion to Dismiss the Original Complaint should be denied.

Now, Therefore, It Is Hereby Ordered that the said Motions of the Defendant and the Third Party Defendant be and the same hereby are denied.

Dated this 22nd day of July, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed July 24, 1953.

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[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Attorneys of record for the Plaintiffs and the Defendant that the Defendant, The Hallack and Howard Lumber Company, a corporation, may have and take until the 20th day of August, 1953, in which to prepare, serve and file its answer to the complaint of the Plaintiffs on file herein.

Dated this 28th day of July, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

Attorney for Defendant and  
Third-Party Plaintiff.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT AND THIRD-PARTY PLAINTIFF TO PLAINTIFFS' COMPLAINT

Comes Now, the Defendant, The Hallack and Howard Lumber Company, a corporation, and for answer to Plaintiffs' complaint filed herein denies each and every allegation therein contained not hereinafter expressly admitted or denied.

I.

Answering Paragraph I of said complaint the Defendant admits the allegations therein contained.

II.

Answering Paragraph II of said complaint the Defendant admits the execution and delivery of the Lease, a true copy of which is attached to Plaintiffs' complaint and marked Exhibit "A," and denies each and every other allegation in said Paragraph II contained.

III.

Answering Paragraph III of said complaint the Defendant admits that on or about September 15, 1949, the aforesaid Lease Agreement was in full force and effect, and admits that on said date a piece of timber, or a slab or splinter broke off one of the logs that were being unloaded and struck one A. M. Powell, a car inspector employed by the Plaintiff, Union Pacific Railroad Company, and injured him. Defendant denies each and every other

allegation contained in said Paragraph III of said complaint.

Further answering the allegations contained in said Paragraph III the Defendant alleges the facts to be that at the time the said A. M. Powell was injured that the said leased premises were in the exclusive charge and control of W. O. Bedal the Third-Party Defendant herein, an Independent contractor, his servants, agents and employees, and that any logs that were unloaded were being unloaded by said Third-Party Defendant as an independent contractor, and that this Defendant had nothing whatsoever to do with the condition of said premises, the construction or maintenance of said log bunker, or the unloading of said logs, or with the reloading of the same on railroad cars, and in no manner whatsoever contributed directly or indirectly to any injury suffered by the said A. M. Powell, and that any injury suffered by the said A. M. Powell was caused by the negligence of the said W. O. Bedal, his servants, agents and employees.

#### IV.

Answering Paragraph IV of said complaint the Defendant admits that on the 23rd day of October, 1950, A. M. Powell filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the Plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained by him and demanding judgment in the amount of \$45,000.00. Defendant

denies each and every other allegation contained in said Paragraph IV of said complaint.

V.

Answering Paragraph V of said complaint the Defendant admits the allegations therein contained.

VI.

Answering Paragraph VI of said complaint the Defendant admits the allegations therein contained.

VII.

Answering Paragraph VII of said complaint the Defendant admits that the Union Pacific Railroad Company, one of the Plaintiffs herein, compromised said judgment by paying to the said A. M. Powell a sum of money, and that said judgment was fully satisfied, but as to the amount of money paid under said compromise settlement this Defendant has not sufficient information or belief to enable it to form an opinion as to the exact amount paid, and therefore, denies that the amount paid by the Union Pacific Railroad Company to the said A. M. Powell was in excess of the sum of \$14,094.14.

VIII.

Answering Paragraph VIII of said complaint the Defendant admits that it has not paid the Plaintiffs any part of the damages or expenses incurred by the Plaintiffs in the action of A. M. Powell versus Union Pacific Railroad Company, and Defendant denies each and every other allegation in said Paragraph VIII contained.

IX.

Answering Paragraph IX of said complaint the Defendant denies each and every allegation therein contained.

Further Special and Affirmative Defense

As a further special and affirmative defense the Defendant alleges:

I.

That on September 15, 1949, at the time the said A. M. Powell was injured the leased premises were occupied and used by the said W. O. Bedal, the Third-Party Defendant in this action, and at said time the said W. O. Bedal, his servants, agents and employees, had the exclusive charge and control of the said log loading bunker at Banks, Idaho, and that the said W. O. Bedal had charge of the unloading of the logs from the trucks and the re-loading of the same onto railroad cars and that any injuries suffered by the said A. M. Powell on account of the negligence of any person or persons was suffered because of the negligence of the the said W. O. Bedal, all of which is more fully set forth in this Defendant's Third-Party Complaint filed against the said W. O. Bedal, and all of which is hereby by this reference incorporated herein.

Wherefore, Defendant having fully answered, prays to be hence dismissed with just costs and disbursements herein incurred.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

Acknowledgment of Service and Certificate of  
Copy attached.

[Endorsed]: Filed August 19, 1953.

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[Title of District Court and Cause.]

ANSWER OF THIRD PARTY DEFENDANT  
TO PLAINTIFFS' COMPLAINT AND TO  
THIRD PARTY COMPLAINT

Comes Now the Third-Party Defendant, W. O. Bedal, and for answer to plaintiffs' complaint filed herein, Denies each and every allegation therein contained not hereinafter expressly Admitted or denied.

I.

Answering paragraph I of said complaint the Third-Party Defendant admits the allegations therein contained.

II.

Answering paragraph II of said complaint the Third-Party Defendant admits the execution and delivery of lease, a true copy of which is attached to plaintiffs' complaint and marked Exhibit "A" and Denies each and every other allegation in paragraph II contained.



III.

Answering paragraph III of said complaint the Third-Party defendant admits that on or about September 15th, 1949, the said lease agreement was in full force and effect, and denies each and every other allegation contained in said paragraph III of said complaint.

IV.

Answering paragraph IV of said complaint the said Third-Party defendant Admits that on the 23rd day of October, 1950, A.M. Powell filed an action in the United States District Court for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages claimed to be sustained by him and demanding judgment in the amount of \$45,000.00; denies each and every other allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V of said complaint Third-Party Defendant has not sufficient information or belief to enable him to answer said allegations and therefore denies each and every allegation of paragraph V.

VI.

Answering paragraph VI of said complaint, Third-Party Defendant admits the allegations of the first nine lines of said paragraph; that Third-Party Defendant does not have sufficient information or belief to enable him to answer the balance

of said paragraph, and therefore denies the balance of said paragraph VI.

#### VII.

Answering paragraph VII, Third-Party Defendant does not have sufficient information or belief on which to answer said allegations, and therefore denies all the allegations of said paragraph VII.

#### VIII.

Answering paragraph VIII of said complaint, Third-Party Defendant does not have sufficient information and belief to enable him to answer the allegations of said paragraph and therefore denies each and every allegation thereof.

#### IX.

Answering paragraph IX of said complaint, Third-Party Defendant denies each and every allegation therein contained.

Further Special and Affirmative Defenses:

#### I.

Third-Party Defendant hereby refers to his special and affirmative defenses to the complaint of Third-Party Plaintiff and by this reference incorporates the same as special and affirmative defenses to the complaint.

Comes Now the Third-Party Defendant, W. O. Bedal, and for answer to the complaint of Third-Party Plaintiff filed herein, denies each and every allegation therein contained not hereinafter expressly admitted or denied.

First Count

I.

Answering paragraph I of said Third-Party Complaint, Third-Party Defendant admits the allegations thereof.

II.

Answering paragraph II of said Third-Party Complaint Third-Party Defendant admits the allegations thereof.

III.

In answer to paragraph III of said Third-Party Complaint Third-Party Defendant admits the allegations thereof.

IV.

In answer to paragraph IV of said Third-Party Complaint Third-Party Defendant admits that he was operating under said contract as an independent contractor; denies the other allegations of paragraph IV.

V.

Admits that on or about the 15th day of September, while Third-Party Defendant was unloading logs at Banks, Idaho, under said logging contract, a piece of timber broke off and struck A. M. Powell, an employee of Union Pacific Railroad Company, and admits that said A. M. Powell obtained against Union Pacific Railroad Company a judgment, a copy of which is attached as Exhibit "C" to Third-Party Complaint, and in this connection Third-Party Defendant alleges the fact to be that said accident did not occur by reason of any negligence

whatsoever on the part of said Third-Party Defendant; Third-Party Defendant further alleges that any injuries received by said A. M. Powell resulted from the contributory negligence on the part of A. M. Powell, and that the contributory negligence on the part of A. M. Powell was the proximate cause of said accident and the injuries resulting therefrom, all of which is more particularly set forth in the affirmative defense set forth below.

#### VI.

Denies the allegations of paragraphs VI, VII and VIII of said Third-Party Complaint.

#### VII.

Admits the allegations of paragraphs IX and X of said Third-Party Complaint.

### Second Count

#### I.

Third-Party Defendant denies each and every allegation of said second count except such as are specifically admitted herein.

#### II.

Denies each and every allegation of paragraph II except that Third-Party Defendant admits that at said time the Third-Party Defendant was an independent contractor and was not the servant, agent or employee of Third-Party Plaintiff.

First Further Special and Affirmative Defense to  
Each Count:

As a further, special and affirmative defense to

each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the judgment obtained against Union Pacific Railroad Company by A. M. Powell is not res judicata as to this Third-Party Defendant; that the issues involved in said suit against the Union Pacific Railroad Company are not the same issues as would have been involved in a suit against this Third-Party Defendant. For one thing, the issues of negligence in the Powell case was the failure of the Railroad Company to furnish Powell a safe place to work. The place furnished him to work was below the spot where Bedal unloaded logs.

It was alleged in the complaint:

“That the method of unloading logs from the trucks down said incline was hazardous and dangerous to the life and limb of persons near said log bunker, as Defendants knew, or by the exercise of reasonable care, could and should have known.”

The unloading was not a negligent act. It was by its nature hazardous and dangerous. The question determined by the jury was whether the Railroad Company in furnishing a place to work down below the hazardous and dangerous operations was negligent.

In the second place, contributory negligence on the part of A. M. Powell was not, and could not

be set up as a defense. The Court instructed the jury as follows:

“You are instructed that under the terms of the Federal Employers’ Liability Act, which is the act under which this action is brought, if you find that the defendant, Union Pacific Railroad, was guilty of any negligence whatsoever as alleged in the complaint and you further find that such negligence proximately contributed to plaintiff’s injury, if you find there was any injury, then you are advised that the plaintiff has met the requirement of the law concerning the proof of negligence.”

And again:

“The Employers’ Liability Act, heretofore mentioned provides: ‘In all actions brought against such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.’ ”

In the third place, the assumption of risk could not be pleaded. The jury was instructed:

“It is no defense for the defendant, the Union Pacific Railroad Company, to claim that the plaintiff assumed the risks connected with

his employment as a car inspector. In these cases the defense of assumption of risk has been eliminated.”

In the fourth place, the defense of the accident being an “unavoidable accident” was not at issue and could not be at issue in that case.

Second Further Special and Affirmative Defense to Each Count:

As a second, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the Union Pacific Railroad Company gave no notice of pendency of action to Third-Party Defendant in connection with said Powell case; that the action against the Railroad Company was brought under the Federal Liability Act; that Third-Party Defendant was not a party to that action, and no request was made by the Union Pacific Railroad Company that Third-Party Defendant be made a party; that even though the attempt had been made to make Bedal a party in that suit it would have been impossible to have tried the issues which must be raised in a suit against Bedal in the same action which involves the Federal Employers' Liability Act. Reference is hereby made to the first affirmative defense and the same incorporated herein as a part of this second affirmative defense.

Third Further Special and Affirmative Defense to  
Each Count:

As a third, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

The injuries sustained by A. M. Powell were the direct and proximate result of negligence on the part of A. M. Powell; that his own negligence contributed to and was the proximate cause of any injuries sustained by him.

Fourth Further Special and Affirmative Defense to  
Each Count:

As a fourth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the accident in which said Powell was injured was, so far as this defendant is concerned, an unavoidable accident.

Fifth Further Special and Affirmative Defense to  
Each Count:

As a fifth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That said A. M. Powell, in connection with his



employment as a car inspector, at the place where he worked and was stationed by his employer, assumed the risks incident to said employment so far as this Third-Party Defendant is concerned.

Sixth Further Special and Affirmative Defense to  
Each Count:

As a sixth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party defendant alleges:

I.

That there was no indemnity agreement, expressed or implied, whereby Third-Party Defendant indemnifies either Union Pacific Railroad Company or Hallack & Howard; that there was a written contract between Hallack and Howard and Bedal; that although Hallack and Howard already had a lease from the Railroad Company which incorporated a written and specific provision of indemnity, it had no such provision in the contract which it prepared and had Bedal sign; that this contract which was signed is a contract providing for work to be done by an independent contractor.

That if there is any implication from the written contract between Hallack and Howard Lumber Company and Bedal it is that Bedal would be liable only in the event of the negligent operation of the trucks; such implication arising, if at all, by reason of the provision for insurance on the trucks. If this is the foundation for any implication whatso-

ever, such implication would be to the effect there would be no liability on the part of Bedal except when he was negligent in the operation of his trucks.

Seventh Further Special and Affirmative Defense  
to Each Count:

As a seventh, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third Party Defendant alleges:

I.

That said Powell was not under the employment of Third Party Defendant and was not subject in any way whatsoever to the supervision of the Third-Party Defendant; that the presence of said Powell at any place, at any time, was subject only to the direction and order of his employer, Union Pacific Railroad Company, or his own volition; that the accident was the result of no act of negligence on the part of said Bedal; that any splinter or portion of log which flew through the air was a natural happening and something to be anticipated by any one around a logging operation involving the unloading of logs.

Eighth Further Special and Affirmative Defense to  
Each Count:

As an eighth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the finding of the jury against Union Pacific Railroad Company and the judgment entered in connection therewith rules out the proposition and claim that Third-Party Defendant had exclusive use and occupancy of the premises where the accident occurred; that the finding of the jury was to the effect and established the fact that Union Pacific Railroad Company was using and occupying the premises; that if there was any negligence on the part of Third-Party Defendant such negligence on his part constituted him a tort feisor along with Union Pacific Railroad Company; that one joint tort feisor has no right of action against the other joint tort feisor.

Wherefore, Third-Party Defendant having fully answered, prays to be hence dismissed with just costs and disbursements herein incurred.

/s/ FRED M. TAYLOR,

/s/ CARL P. BURKE,

/s/ LAUREL E. ELAM,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed August 27, 1953.

[Title of District Court and Cause.]

### REQUEST FOR A JURY

Request is hereby made for a jury under the rules of this Court.

Dated: September 1, 1953.

/s/ LAUREL E. ELAM,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Service of copy acknowledged.

[Endorsed]: Filed September 1, 1953.

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[Title of District Court and Cause.]

### MOTION TO STRIKE

The plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, move the Court to strike from the Answer of the Third-Party Defendant to plaintiffs' Complaint and the Third-Party Complaint, the following appearing on page 3 of said Answer:

“Further Special and Affirmative Defenses:

“I.

“Third-Party Defendant hereby refers to his special and affirmative defenses to the complaint of Third-Party Plaintiff and by this

reference incorporates the same as special and affirmative defenses to the Complaint.”

together with each and every “Further Special and Affirmative Defense thereafter set forth, for the reason that said asserted defenses, or either of them, constitute no defense either in law or fact to plaintiffs’ action against the defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and are redundant or immaterial, or both.”

That this Motion is made upon the pleadings, records and files in this action.

Dated, September 3rd, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1953.

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[Title of District Court and Cause.]

MOTIONS TO STRIKE FROM ANSWER OF  
W. O. BEDAL

Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, moves for Orders striking from Third-Party De-

fendant's Answer the following allegations upon the grounds that the same are immaterial, impertinent and do not state a sufficient defense in this action, to wit:

1. Moves to strike the last ten (10) lines of Paragraph V of the First Count of said Answer;

2. Moves to strike all of Paragraph I of the First Further, Special and Affirmative Defense in said Answer;

3. Moves to strike the Second Further, Special and Affirmative Defense in said Answer;

4. Moves to strike the Third Further, Special and Affirmative Defense in said Answer;

5. Moves to strike the Fourth Further, Special and Affirmative Defense in said Answer;

6. Moves to strike the Fifth Further, Special and Affirmative Defense in said Answer;

7. Moves to strike the Sixth Further, Special and Affirmative Defense in said Answer, excepting the words:

“that there was a written contract between The Hallack and Howard Lumber Company and Bedal.”

8. Moves to strike that portion of Paragraph I of the Seventh Further, Special and Affirmative Defense commencing with the word “that” in the sixth line from the top of said Paragraph I to the end of said Paragraph;

9. Moves to strike the Eighth Further, Special and Affirmative Defense in said Answer;

This motion is made upon the records and files

in the above-entitled cause, and each of the above and foregoing paragraphs is a separate motion to strike.

Dated this 12th day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

Acknowledgment of Service and Certificate of Copy attached.

[Endorsed]: Filed September 12, 1953.

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the Parties hereto that at the trial of the above-entitled cause any Party to this action, in lieu of producing personally the hereinafter named witnesses, may read before the Court and Jury and into the record in this case the testimony of any or all of the following witnesses who testified in the case of "A. M. Powell, Plaintiff, versus Union Pacific Railroad Company, Defendant," Case No. 2776, in the United States District Court for the District of Idaho, Southern Division, to wit:

Harry F. Hansen

Charles Ritter

Albert Parrish

Howard Sage

as contained in the transcript of the proceedings had in said trial prepared and certified to by G. C. Vaughan, the official Court Reporter; the reading of said testimony, however, being subject to any objections for relevancy and materiality.

It Is Further Stipulated That any Party to this action may have any or all of said witnesses present in person and have them testify orally at said trial.

Dated this 15th day of September, 1953.

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

/s/ BRYAN P. LEVERICH,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

/s/ LAUREL E. ELAM,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed September 15, 1953.



[Title of District Court and Cause.]

MINUTE ORDER—SEPT. 15, 1953

This cause came on regularly this date in open court on the motion to strike of the Union Pacific Railroad Company and the motion to strike of the Defendant and Third-Party Plaintiff, The Hallack & Howard Lumber Company, L. H. Anderson appearing on behalf of the Union Pacific Railroad Company, Oscar Worthwine appearing for the Defendant, The Hallack & Howard Lumber Company, and Carl A. Burke appearing for the Third-Party Defendant.

After hearing respective counsel, the Court granted the motion to strike as it pertains to the Union Pacific Railroad Company, and took under advisement the motion to strike of the Defendant and Third-Party Plaintiff.

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[Title of District Court and Cause.]

ORDER OVERRULING MOTION TO STRIKE

The Defendant and Third-Party Plaintiff having filed herein its Motion to Strike from the affirmative defenses set out by the Third-Party Defendant, and the same having come on regularly for hearing on the 15th day of September, 1953, at the hour of 3:30 o'clock p.m., and oral arguments being had and briefs filed, and the Court having come to the conclusion that said Motion to Strike should be overruled and denied, without prejudice,

It Is Hereby Ordered:

That the said Motion to Strike of the Defendant and Third-Party Plaintiff is hereby denied without prejudice.

Dated this 17th day of September, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed September 17, 1953.

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[Title of District Court and Cause.]

MINUTE ORDER—SEPT. 21, 1953

No. 2944-S, Civil

This cause came on for trial before the Court as to Oregon Short Line Railroad Company, et al., Plaintiff, v. The Hallack & Howard Lumber Company, Defendant, and before the Court and jury as to The Hallack & Howard Lumber Company, Third-Party Plaintiff, v. W. O. Bedal, Third-Party Defendant.

L. H. Anderson, Esquire, appeared as counsel for the Oregon Short Line Railroad Company and the Union Pacific Railroad Company; J. L. Eberle, Esquire, and Oscar W. Worthwine, Esquire, appeared for The Hallack and Howard Lumber Company; and Fred Taylor, Esquire, and Laurel Elam, Esquire, appeared for W. O. Bedal.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of

twelve persons, one at a time, written on separate slips of paper, to secure a jury. Blanche W. Mills, Harold H. Martin, and Jere J. Long, whose names were so drawn, were excused for cause; Ruth L. Gilbert, Jess A. Breshears and Nell Aikens, whose names were also drawn, were excused on the Third-Party Plaintiff's peremptory challenge; and Alice Baker and Harold G. Brown, whose names were likewise drawn, were excused on the Third-Party Defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to wit:

Hassell Blankenship  
Hilda McAfee  
Margaret Slater  
Rosemary Emery  
Amy L. Wheeler  
Roy C. Boatman  
Irene Krebs  
Carl Emory  
John F. Bruins  
Lawrence W. Elliott  
Amy H. Clark  
Harry A. Chase

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of Stella O. Elmore and Hattie L. Carson were drawn from the jury box, and on being

sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

After a statement of plaintiffs' case by their counsel, Earl W. Bruett and George Hubbard were sworn and examined as witnesses on the part of the plaintiffs.

After admonishing the jury, the Court excused them to 10 o'clock a.m., on Tuesday, September 22, 1953, and further trial of the cause was continued to that time.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause as between the plaintiffs herein and The Hallack and Howard Lumber Company, a corporation, defendant, came on regularly for trial before the Court, and the Court having duly considered the evidence and being fully advised in the premises, now finds the following:

### Findings of Fact

#### I.

That the plaintiffs, and each of them, are corporations organized and existing under the laws of the State of Utah; the defendant, The Hallack and Howard Lumber Company, is a corporation organized and existing under the laws of the State of

Colorado. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

That on the 3rd day of March, 1944, the plaintiffs herein as lessor entered into a lease agreement with the defendant, The Hallack and Howard Lumber Company, as lessee, whereby a portion of the lessor's premises at Banks, Boise County, Idaho, was leased to the said Lumber Company for a log loading site, a true copy of which lease is attached to plaintiffs' complaint marked Exhibit "A" and admitted in evidence. That said lease, among other things, provides:

"that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damages or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

## III.

That on the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect, and that at Banks, Idaho, on said date, while the defendant, its agents, servants or employees were unloading logs on or onto said leased premises

and using and occupying said premises in accordance with the terms and conditions of said lease a piece of timber broke off one of the logs being unloaded from a truck and struck one, A. M. Powell, a car inspector employed by the Union Pacific Railroad Company, seriously injuring the said A. M. Powell.

#### IV.

That as a result of said accident and injuries sustained, A. M. Powell, on the 3rd day of October, 1950, filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained, demanding judgment in the sum of \$45,000.00.

#### V.

That thereupon the plaintiff, Union Pacific Railroad Company, gave notice to the defendant herein of the pendency and nature of said action, calling its attention to the lease and its provisions hereinbefore referred to, and tendered to said defendant the defense of said action, requesting that said defense be undertaken by it, with notice that the plaintiff Union Pacific Railroad Company expected to be fully reimbursed for any judgment that might be recovered against it by the said Powell, together with all expenses incurred in the event said defendant did not take over said defense and assume all liability, but that said defendant refused and neglected to do so.

VI.

That the plaintiff, Union Pacific Railroad Company, conducted said defense in said action in good faith and with due diligence before the court and jury, commencing the 26th day of February, 1951, and on the 2nd day of March, 1951, the jury returned a verdict in favor of said Plaintiff A. M. Powell, and against the said Union Pacific Railroad Company in the sum of \$15,000.00. Judgment on the verdict, including costs in the amount of \$92.26, with interest at 6% per annum, was entered, and on September 18, 1951, Motion for Judgment Notwithstanding the Verdict was by the court denied, and which judgment the defendant herein had notice but it failed, refused and neglected to take any part in any or all of the further proceedings had in connection with said action.

VII.

That thereafter, to wit, on the 15th day of December, 1951, the said Union Pacific Railroad Company compromised said judgment by paying to the said plaintiff A. M. Powell the total sum of \$14,500.00, and said judgment was fully satisfied.

VIII.

That the slab which struck the said plaintiff A. M. Powell came from a log being unloaded from a truck on a road some twenty feet above the location of the bunker where the logs were loaded on the train and a "Cat" and boom was used, a line placed underneath the logs and they were pushed

off the truck and would fall down a steep incline unrestrained a distance of about twenty feet where they were pushed from the truck. The incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the bunker. The slab that caused the injury to the said plaintiff A. M. Powell broke off one of those logs and was thrown through the air and was caused to break from the log because of the force of the drop.

### IX.

That the logs in question were being unloaded by one W. O. Bedal, his agents, servants or employees, who were using the premises covered by the lease hereinbefore referred to and were performing the work of hauling, unloading and the loading of logs onto plaintiffs' car for shipment by the Hallack and Howard Lumber Company and for the use and benefit of The Hallack and Howard Lumber Company under an arrangement whereby the said Bedal performed said unloading and loading of said cars for and on behalf of said Lumber Company in place of said Lumber Company performing said work itself.

### X.

That the defendant The Hallack and Howard Lumber Company was the owner of the logs being unloaded at the time and place the said A. M. Powell was injured and paid the said Bedal for the hauling, unloading and loading of logs on the



premises leased by the plaintiffs to the defendant The Hallack and Howard Lumber Company.

## XI.

That the plaintiffs or either of them had no duties to perform in connection with either the unloading or the loading of logs at Banks, Idaho, and at the time and place Powell was injured were performing no part of the work of unloading or of loading the said logs. That the unloading of the logs onto said leased premises and the loading of said logs from said leased premises onto the cars of the plaintiffs were performed solely and entirely by the defendant The Hallack and Howard Lumber Company by and through its agent, the said W. O. Bedal. That the said Union Pacific Railroad Company was held liable for the injuries sustained by the said A. M. Powell only because it had not furnished Powell a safe place within which to perform his work, a duty which was nondelegable as between the Union Pacific Railroad Company and the said Powell. That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, its agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's injuries was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner

and under the circumstances hereinbefore referred to.

## XII.

The the plaintiff Union Pacific Railroad Company has sustained damages for the settlement made by it in satisfaction of the judgment in the said case of A. M. Powell vs. Union Pacific Railroad Company in the amount of \$14,500.00, costs and expenses of litigation in the amount of \$1,076.98, together with reasonable attorney's fees in the amount of \$1,000.00.

### Conclusions of Law

From the foregoing facts the Court concludes:

#### I.

That the accident and resulting injuries to the said Powell arose out of the use and occupation of said leased premises and the unloading of the logs thereon by The Hallack and Howard Lumber Company, its agents, servants, or employees, who had possession of said premises and was performing the work of unloading of said logs thereon for the purpose of loading dogs from said premises onto cars for shipment by the defendant The Hallack and Howard Lumber Company, and that under the provisions of said lease agreement, or independent of said lease, it became, was, and is the duty of the defendant The Hallack and Howard Lumber Company, to assume and pay for all injuries and damages sustained by the said A. M. Powell and to indemnify the plaintiff, the Union Pacific Railroad

Company, against, and save it harmless from, all liability for such injuries, damages or loss.

II.

That the Union Pacific Railroad Company is entitled to have and recover from the defendant, The Hallack and Howard Lumber Company, the sum of \$14,500.00; costs and expenses of litigation in the amount of \$1,076.98; reasonable attorney's fees in the amount of \$1,000.00; with interest on said amounts at the rate of six per cent (6%) per annum from the 15th day of December, 1951, to the date of judgment entered herein.

Let Judgment be entered accordingly.

Dated this 22nd day of September, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed September 22, 1953.

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[Title of District Court and Cause.]

OBJECTIONS BY DEFENDANT AND THIRD-PARTY PLAINTIFF, THE HALLACK AND HOWARD LUMBER COMPANY, TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE PLAINTIFF RAILROAD COMPANIES

I.

Defendant and Thirty-Party Plaintiff objects to proposed Finding of Fact No. III in that it refers

to the Defendant's agents, servants and employees unloading the logs, and the record shows without contradiction, that the only person engaged in unloading logs was the said W. O. Bedal, Third-Party Defendant, as an independent contractor.

## II.

Defendant and Third-Party Plaintiff objects to proposed Finding of Fact No. VIII upon the ground that the logs falling down the incline would go a distance of about twenty feet, and instead would go a distance of about forty-seven feet.

## III.

Defendant and Third-Party Plaintiff objects to proposed Finding of Fact No. XI upon the following grounds:

a. That the loading and unloading was done by The Hallack and Howard Lumber Company, or by or through its agents, the record showing conclusively that the entire operation complained of was done by W. O. Bedal as an independent contractor;

b. That the unsafe place alleged was not created by the fault of The Hallack and Howard Lumber Company, its agents, servants or employees, but by the active and primary negligence of W. O. Bedal;

c. That the said W. O. Bedal was not the agent of The Hallack and Howard Lumber Company, but was an independent contractor.

## IV.

Defendant and Third-Party Plaintiff objects to

Conclusion of Law No. 1 upon the ground that the use of the premises by The Hallack and Howard Lumber Company was not through its agents, servants or employees, but only through W. O. Bedal as an independent contractor.

V.

Defendant and Third-Party Plaintiff objects to the proposed Findings of Fact and Conclusions of Law upon the ground that in the event the Court holds and finds that there was any act of negligence, other than the primary and active negligence of W. O. Bedal, the judgment in favor of the Plaintiffs cannot be sustained under the terms and provisions of the Lease Agreement because such terms and provisions do not indemnify said Plaintiffs against their own negligence.

Dated this 22nd day of September, 1953.

/s OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for The Hallack and Howard Lumber  
Company, Defendant and Third-Party Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed September 22, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—SEPTEMBER 22, 1953

This cause came on for further trial before the Court as to Oregon Short Line Railroad Company, et al., Plaintiffs, vs. The Hallack and Howard Lumber Company, Defendant, and before the Court and jury as to The Hallack and Howard Lumber Company, Third-Party Plaintiff, vs. W. O. Bedal, Third-Party Defendant.

L. H. Anderson read portions of the transcript of the record in case No. 2776, and here the plaintiffs rest; and here defendant The Hallack and Howard Lumber Company rests.

The Court found that the Union Pacific Railroad Company is entitled to recover from The Hallack and Howard Lumber Company, and counsel for the Union Pacific Railroad Company was ordered to prepare Findings of Fact and Conclusions of Law and Judgment.

J. L. Eberle made an opening statement for the Third-Party Plaintiff The Hallack and Howard Lumber Company and U. R. Armstrong was sworn and examined as a witness on the part of the Third-Party Plaintiff; and here the Third-Party Plaintiff rests.

The Third-Party Plaintiff having rested, comes now the Third-Party Defendant and moves the Court for an order dismissing the Complaint of the Third-Party Plaintiff, which motion was overruled without prejudice. Here the Third-Party Defendant rests and all parties close.

Comes now the Defendant and Third-Party Plaintiff and moves the Court for a directed verdict in favor of the Defendant and Third-Party Plaintiff and against the Third-Party Defendant. Said motion was taken under advisement by the Court.

After admonishing the jury, the Court excused them to 10 o'clock a.m. on Wednesday, September 23, 1953, and further trial of the cause was continued to that time.

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United States District Court for the District  
of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Defendant and  
Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

### JUDGMENT

The cause of the plaintiffs herein against the defendant, The Hallack and Howard Lumber Com-

pany, having come on regularly for trial before the court without a jury, and testimony and evidence having been offered by the respective parties, and the court having filed its Findings of Fact and Conclusions of Law and Order for Judgment, Now, Pursuant thereto, It Is Hereby:

Ordered and Adjudged that the plaintiff, Union Pacific Railroad Company, do have and recover of and from the defendant, The Hallack and Howard Lumber Company, the sum of \$16,576.98, with interest thereon from the 15th day of December, 1951, to the date of this judgment amounting to \$1,757.17, making a total judgment of \$18,334.15, together with its costs and disbursements in this action to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of the Court in the sum of \$.....

Dated, this 22nd day of September, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed September 22, 1953.

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[Title of District Court and Cause.]

### ORDER STAYING EXECUTION

A judgment having been heretofore entered in the above-entitled cause in favor of the Plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, in the sum of \$18,334.15



against the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and a judgment having been entered in the above-entitled cause in favor of the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, in the sum of \$18,334.15 against the Third-Party Defendant, W. O. Bedal, and good cause therefore being shown,

It Is Hereby Ordered:

That any and all executions on the judgment in favor of the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and against the Third-Party Defendant, W. O. Bedal, be, and hereby are, stayed until the said judgment of the Plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and against the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, is satisfied and discharged.

Dated this 23rd day of September, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed September 23, 1953.

---

[Title of District Court and Cause.]

### VERDICT

We, the jury in the above-entitled cause, find for the Third-Party Plaintiff, The Hallack and Howard

Lumber Company, a Corporation, and against the Third-party Defendant, W. O. Bedal, and assess damages against said Third-Party Defendant in the sum of \$18,334.15.

/s/ H. A. CHASE,  
Foreman.

[Endorsed]: Filed September 23, 1953.

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[Title of District Court and Cause.]

MINUTE ORDER—SEPTEMBER 23, 1953

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

At this time the Court granted the motion of the Third-Party Plaintiff for a directed verdict and appointed Harry A. Chase foreman of the jury, who signed the verdict, which was in the words following:

“(Title of Court and Cause.)

“Verdict

“We, the jury in the above-entitled cause find for the Third-Party Plaintiff, The Hallack and Howard Lumber Company, a Corporation, and against the Third-Party Defendant, W. O. Bedal,

and assess damages against said Third-Party Defendant in the sum of \$18,334.15.

“H. A. CHASE,  
“Foreman.”

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

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In the District Court of the United States for  
the District of Idaho, Southern Division  
No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and  
Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

### JUDGMENT

The cause of the Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation,

against the Third-Party Defendant, W. O. Bedal, having come on for trial before the Court and a jury, both parties appearing by counsel, and the issues having been duly tried, and the Court on motion of the Third-Party Plaintiff directed the jury to render a verdict for Third-Party Plaintiff and against Third-Party Defendant in the sum of \$18,334.15, and the jury having done so,

It Is Hereby Ordered, Adjudged and Decreed That the Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, recover of Third-Party Defendant, W. O. Bedal, the sum of \$18,334.15, and its costs of action.

Dated this 23rd day of September, 1953.

[Seal]     /s/   ED M. BRYAN,  
   Clerk.

[Endorsed]: Filed September 23, 1953.

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[Title of District Court and Cause.]

#### NOTICE OF TAXATION OF COSTS

To: Messrs. Elam and Burke, and Fred M. Taylor,  
Attorneys for Third-Party Defendant.

Please Take Notice that the attached Bill of Costs will be presented to the Clerk of the above-entitled Court for taxing at his office in the Federal Building

in Boise, Ada County, Idaho, on the 29th day of September, 1953, at 10:00 o'clock a.m., or as soon thereafter as the matter may be heard.

Dated this 23rd day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND  
DISBURSEMENTS

Disbursements

Marshal's fee for service of Summons  
and Third-Party Complaint upon  
W. O. Bedal, Third-Party Defendant. . . . \$12.20

Witness fees for U. R. Armstrong  
as follows:

Two days attendance at \$4.00 per day. . . . . 8.00

Four days subsistence at \$5.00 per day. . . . . 20.00

Mileage from Winchester, Idaho, to Boise,  
and return, 460 miles at 7c per mile. . . . . 32.20

Total Disbursements . . . . . \$72.40

Costs taxed this 26th day of Sept., 1953, in the amount of \$12.20.

/s/ ED M. BRYAN,  
Clerk.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed September 23, 1953.

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[Title of District Court and Cause.]

### NOTICE

To: Oscar W. Worthwine, Boise, Idaho, Attorney for Defendant; Laurel E. Elam, Boise, Idaho, Attorney for Third-Party Defendant.

Please Take Notice, that the Bill of Costs, a copy of which is hereto attached, will be presented to the Clerk of the above-entitled Court for taxation, at his office in the Federal Building, in the City of Boise, Idaho, on the 1st day of October, 1953, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated, September 24, 1953.

/s/ L. H. ANDERSON,  
Of Counsel for Plaintiffs.

Affidavit of service by mail attached.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OF COSTS  
AND DISBURSEMENTS

Clerk's Fees:

Filing Complaint .....	\$15.00
Certifying papers from file in case Powell vs. UPRR Co.....	2.30

Service Fees:

Marshal's Fee—Service of Summons....	2.00
Marshal's Fee—Service of subpoena on George Hibbard .....	10.10

Attorneys Docket Fee ..... 20.00

Witnesses:

Earl W. Bruett, Nampa, Idaho, mileage, 20 miles each way @ 7c, \$2.80 1 day attendance .....	4.00	6.80
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George Hibbard, Banks, Idaho, mileage, 43 miles each way @ 7c, \$6.02 1 day attendance .....	4.00	10.02
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Total .....\$66.22

Costs taxed this 26th day of Sept., 1953, in the amount of \$66.22.

/s/ ED M. BRYAN,  
Clerk.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

### MOTION TO AMEND FINDINGS

Comes Now, the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, and having made timely objection to the Findings of Fact proposed by the Plaintiffs herein, moves the Court to amend the same in the following particulars:

#### I.

That in line 3 of paragraph III the words "its" be stricken, and in lieu thereof, the following words be inserted:

"By and through W. O. Bedal, an independent contractor, his"

#### II.

That in line 9 of paragraph XI the word "agent" be stricken, and in lieu thereof, the following words be inserted:

"independent contractor."

#### III.

That in line 7, from the end of paragraph XI, the word "its" be stricken, and in lieu thereof, the following words be inserted:

"by and through W. O. Bedal, his"

Dated this 23rd day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.



ORDER

For good cause shown, It Is Hereby Ordered That the above and foregoing Motion be, and hereby is, granted, and said Findings of Fact be, and hereby are, amended accordingly.

Dated this 25th day of September, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed September 25, 1953.

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[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT

Comes Now the Third-Party Defendant, W. O. Bedal, and objects to the Findings of Fact submitted by the plaintiffs herein, and moves the Court to amend the same in the following particulars:

I.

That the following portion of paragraph XI be stricken, to wit:

“That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell’s

injuries was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to.”

## II.

That there be stricken from Paragraph I of the Conclusions of Law, in lines 8 and 9 thereof, the following:

“or independent of said lease.”

Dated this 2nd day of October, 1953.

/s/ LAUREL E. ELAM,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

Affidavit of service and certificate of service attached.

[Endorsed]: Filed October 2, 1953.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that W. O. Bedal, Third-Party Defendant in the above action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on behalf of the Hallack and Howard Lum-

ber Company, on September 23, 1953, and from that Order of the United States District Court, granting said defendant and Third-Party Plaintiff's Motion for a directed Verdict, said Order being made on September 23, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed October 20, 1953.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the State of Idaho, as surety, are held and firmly bound unto The Hallack and Howard Lumber Company, a corporation, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to said The Hallack and Howard Lumber Company, its successors and assigns, to which payment well and

truly to be made, we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 23rd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company, and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a judgment was rendered against said W. O. Bedal in favor of said The Hallack and Howard Lumber Company, and the said W. O. Bedal having filed herewith a notice of appeal to reverse said judgment to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now the condition of this obligation is to secure the payment of costs if said appeal is dismissed, or the judgment affirmed, and for the payment of such costs as the Appellate Court may award if the judgment is modified, and upon payment thereof this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,  
Principal.

[Seal] FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,  
Attorney-in-fact,  
Surety.

Countersigned:

By /s/ FRANK W. KERNS,  
Resident Agent for Fidelity and Deposit Company  
of Maryland, a Corporation.

Acknowledged before me the day and year first  
above written.

/s/ ALICE GOSSI.

[Endorsed]: Filed October 20, 1953.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that W. O. Bedal, Third-Party Defendant in the above action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in favor of the plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, dated September 22, 1953, and from the Findings of

Fact and Conclusions of Law filed in support of said Judgment and signed by the United States District Court Judge, Chase A. Clark, under date of September 22, 1953.

Dated this 17th day of October, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed October 20, 1953.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the State of Idaho, as surety, are held and firmly bound unto Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, said plaintiffs, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to said plaintiffs, their successors and assigns, to

which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 22nd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a judgment was rendered against said The Hallack and Howard Lumber Company in favor of said plaintiffs, and the said W. O. Bedal having filed herewith a notice of appeal to reverse said judgment, and to the Findings of Fact and Conclusions of Law to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of this obligation is to secure the payments of costs if said appeal is dismissed, or the judgment and Findings of Fact and Conclusions of Law affirmed, and for the payment of such costs as the Appellate Court may award if the judgment, Findings of Fact and Conclusions of Law are modified, and upon payment thereof this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any

papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,  
Principal.

[Seal] FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,  
Attorney-in-fact,  
Surety.

Countersigned:

By /s/ FRANK W. KERNS,  
Resident Agent for Fidelity and Deposit Company  
of Maryland, a Corporation.

Acknowledged before me the day and year first  
above written.

/s/ ALICE GOSSI.

[Endorsed]: Filed October 20, 1953.

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the



State of Idaho, as surety, are held and firmly bound unto The Hallack and Howard Lumber Company, a corporation, in the full and just sum of Twenty Thousand (\$20,000.00) Dollars to be paid to said The Hallack and Howard Lumber Company, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 23rd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company, and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a Judgment was rendered against said W. O. Bedal in favor of said The Hallack and Howard Lumber Company, and the said W. O. Bedal having filed a notice of appeal to reverse said judgment to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now the condition of this obligation is such that if the said W. O. Bedal shall prosecute his appeal to effect and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full said modification of the judgment and such costs, inter-

est and damages as the Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,  
Principal.

[Seal] FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,  
Attorney-in-fact,  
Surety.

Countersigned:

By /s/ FRANK W. KERNS,  
Resident Agent for Fidelity and Deposit Company  
of Maryland, a Corporation.

Acknowledged before me the day and year first above written.

/s/ ALICE GOSSI.

The form of the foregoing Bond and the sufficiency of the Surety are hereby approved.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to January 18, 1954. .

Dated this 25th day of November, 1953.

/s/ CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed November 25, 1953.

In the United States District Court for the  
District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Defendant and

Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

### TRANSCRIPT OF PROCEEDINGS

This matter came on for hearing before the Honorable Chase A. Clark, United States District Judge, without a jury, as to the Plaintiff vs. Hallack and Howard, Defendant, and also came on for hearing before the Honorable Chase A. Clark, sitting with a jury as to Hallack & Howard Lumber Company vs. W. O. Bedal, third-party defendant, on September 21, 1953, at Boise, Idaho.

L. H. ANDERSON, ESQ.,

E. H. CASTERLIN, ESQ.,

Attorneys for the Plaintiff.

OSCAR W. WORTHWINE, ESQ.,

J. L. EBERLE, ESQ.,

Attorneys for Defendant, and Third-Party  
Plaintiff, Hallack & Howard Lumber  
Company.

FRED M. TAYLOR, ESQ.,

LAUREL E. ELAM, ESQ.,

CARL A. BURKE, ESQ.,

CARL P. BURKE, ESQ.,

Attorneys for Third-Party Defendant, W. O.  
Bedal.

September 21, 1953—10 A.M.

The Court: It is understood that the case of Union Pacific Company vs. Hallack & Howard Lumber Company will be tried before the Court and the case of Hallack & Howard Lumber Company vs. W. O. Bedal will be tried before the jury. It has been agreed by counsel.

(Selection of jury.)

Mr. Eberle: It was also understood this morning that testimony offered before the Court would also be offered as and would be the testimony on the balance or other portion of the case.

The Court: Yes.

Mr. Eberle: If any written evidence is offered and read, it may be understood that any of the counsel may read any portion that was not read by the attorney offering the same.

The Court: That may be understood, wherever

testimony of the former hearing is offered in which the jury is interested, and that would apply where the Court is concerned, it should be treated the same as a deposition and the questions and answers placed in the record in that way. Now you may proceed with your opening statement, Mr. Anderson.

(Statement by Mr. Anderson.)

(Statement by Mr. Elam.) [5\*]

The Court: You may proceed Mr. Anderson.

Mr. Anderson: For the convenience of the Court I am having marked, a photostatic copy of the lease attached to our complaint, it is admitted but I thought for the convenience of the Court we better have one available rather than turn to the pleadings, it is marked "exhibit A" and attached to the complaint. I don't know whether it will be given another number now or not.

The Court: Yes, it will be marked Plaintiff's number 1.

Mr. Anderson: We offer it at this time.

The Court: It may be admitted.

Mr. Anderson: I now offer in evidence, Plaintiffs' exhibit 2 which is a certified copy of certain papers and pleadings in the case of A. M. Powell vs. Union Pacific Railroad Company, consisting of the complaint of Powell, the answer of the Union Pacific, the verdict of the jury and the Judgment of the Court and the Union Pacific's motion for judgment notwithstanding the verdict, the Order

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

of the Court overruling our motion for judgment notwithstanding the verdict, motion for supersedeas, order granting supersedeas, notice of appeal, supersedeas and cost bond, designation of the record on appeal, reporter's transcript, notice to appellee of the appeal and the filing of bond, order extending time for filing record on appeal, satisfaction of judgment and notice to dismiss appeal. I offer these in evidence as plaintiffs' exhibit 2.

The Court: Any objection?

Mr. Elam: We object to anything beyond the judgment, there is no relevancy for anything beyond the judgment, in fact there was no appeal, this matter was all set forth in the pleadings and not denied.

The Court: The objection is overruled and the the exhibit may be admitted.

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## PLAINTIFF'S EXHIBIT No. 2

In the United States District Court for the District  
of Idaho, Southern Division

No. 2776

A. M. POWELL,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

## COMPLAINT

Comes Now the plaintiff in the above-entitled action, and for a cause of action against the above-named defendant complains and alleges as follows:

## I.

This action arises under the Act of April 22, 1908, Chap. 149, 33 Stat. 65, 66, as amended; U.S.C., Title 45, Secs. 51-60, inclusive, as amended, as hereinafter more fully appears.

## II.

During all the times herein mentioned, defendant was a corporation organized and existing under the laws of the State of Utah, and owned and operated in interstate commerce a railroad passing through Boise County, State of Idaho.

## III.

During all the times herein mentioned, there was



Plaintiff's Exhibit No. 2—(Continued)

located on the property of defendant, near Banks, Boise County, State of Idaho, a log bunker close to the tracks of said defendant's railroad for the purpose of stopping logs rolled down an incline to the tracks of defendant's railroad so that they could be loaded on defendant's railroad cars.

IV.

That defendant negligently permitted said log bunker to become filled with bark, limbs, dirt, and other debris, so that it would not properly stop logs rolled down said incline, all of which defendant well knew, or by the exercise of reasonable care could and should have known.

That the method of unloading logs from the trucks down said incline was hazardous and dangerous to the life and limb of persons near said log bunker, as defendants knew, or by the exercise of reasonable care, could and should have known.

V.

That on or about September 15, 1949, plaintiff was employed by defendant as a car inspector and repairman, and, as such employee, part of plaintiff's duties were in the furtherance of interstate commerce, or directly or closely and substantially affected interstate commerce.

VI.

That on or about September 15, 1949, defendant negligently ordered, directed and instructed plain-

## Plaintiff's Exhibit No. 2—(Continued)

tiff to inspect defendant's railroad cars located on defendant's track beside said log bunker, and while so working, pursuant to defendant's orders, by reason of defendant's negligence in thus putting him to work near said log bunker, plaintiff was struck and crushed by a piece of log going over or along said log bunker, and the plaintiff was thereby knocked off of the said bunker.

## VII.

That by reason of defendant's negligence, as aforesaid, the plaintiff suffered a fractured rib and hip bone, broken process on his fourth and fifth lumbar, other serious injuries to his back, and head, and serious injuries to his bowels, intestines, and liver, and other internal injuries.

## VIII.

Prior to these injuries plaintiff was a strong, able-bodied man, capable of earning, and actually earning, approximately \$290.00 per month; that by these injuries he has been made incapable of any gainful activity, and has suffered great physical and mental pain.

Wherefore, plaintiff demands judgment against defendant in the sum of \$45,000.00, and costs.

W. H. LANGROISE,

W. E. SULLIVAN,

Attorneys for Plaintiff.

Plaintiff's Exhibit No. 2—(Continued)

State of Idaho,  
County of Ada—ss.

A. M. Powell, being first duly sworn, deposes and says:

That he resided at Boise, Idaho; that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same are true of his own knowlege, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

A. M. POWELL.

Subscribed and sworn to before me this 27th day of September, 1950.

[Seal]

GLORIAN LEDVINA,  
Notary Public for Idaho.

DEMAND FOR TRIAL BY JURY

Please Take Notice, that plaintiff demands trial by jury in this action.

W. H. LANGROISE,  
W. E. SULLIVAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1950.

## Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

## ANSWER

Comes now the defendant, Union Pacific Railroad Company, and for answer to plaintiff's complaint filed herein denies each and every allegation therein contained not hereinafter expressly admitted or denied.

## I.

Defendant denies each and every allegation contained in paragraphs I, VI, VII and VIII of said complaint.

## II.

Answering paragraph II of said complaint, defendant admits that during the times mentioned in the complaint it was a corporation organized and existing under and by virtue of the laws of the State of Utah and operated a railroad passing through Boise County, State of Idaho.

## III.

Answering paragraph III, defendant admits that there was located a log bunker adjacent to the tracks at Banks, Boise County, Idaho, which was used for the purpose of loading logs onto railroad cars.

## IV.

Defendant denies each and every allegation contained in paragraph IV of said complaint, and alleges that whatever negligence, if any there was,

Plaintiff's Exhibit No. 2—(Continued)

with reference to said log bunker becoming filled with bark, limbs, dirt and other debris, resulted from the acts and conduct of the agents, servants, and employees of The Hallack & Howard Lumber Co., and which constituted the sole proximate cause of any injuries the plaintiff sustained.

V.

Answering paragraph V of said complaint, defendant admits that on or about September 15, 1949, plaintiff was employed as a car inspector. Defendant denies each and every other allegation therein contained.

VI.

Further answering said complaint, defendant alleges that whatever injuries plaintiff sustained were directly contributed to and proximately caused by the carelessness and negligence of the plaintiff.

Wherefore, defendant having fully answered, prays to be hence dismissed with its just costs and disbursements herein incurred.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant, Union Pacific Railroad  
Company.

## Plaintiff's Exhibit No. 2—(Continued)

Residence & P.O. Address, Attorneys for Defendant:

BRYAN P. LEVERICH,  
10 South Main Street,  
Salt Lake City, Utah.

L. H. ANDERSON,  
E. H. CASTERLIN,  
P.O. Box 530,  
Pocatello, Idaho.

I certify that on October 23rd, 1950, I deposited in the United States Post Office at Pocatello, Idaho, a full, true, and correct copy of the foregoing Answer, enclosed in a sealed envelope, postage prepaid, directed to Messrs. W. H. Langroise and W. E. Sullivan, Attorneys at Law, McCarty Building, Boise, Idaho, that being their last known address.

L. H. ANDERSON,  
Of Counsel for Defendant.

[Endorsed]: Filed October 24, 1950.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

## VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, and

Plaintiff's Exhibit No. 2—(Continued)

assess damages against the defendant in the sum of \$15,000.00

GEORGE L. YOST,  
Foreman.

[Endorsed]: Filed March 2, 1951.

United States District Court for the District of  
Idaho, Southern Division

No. 2776

A. M. POWELL,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on February 26, 1951, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of \$15,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant the sum of \$15,000.00 with interest at the rate of 6% per annum, and his costs of action, and that the plaintiff have execution therefor.

## Plaintiff's Exhibit No. 2—(Continued)

Dated at Boise, Idaho, this 2nd day of March, 1951.

[Seal]                   ED. M. BRYAN,  
Clerk, U. S. District Court.

[Endorsed]: Filed March 2, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

MOTION FOR JUDGMENT NOTWITHSTAND-  
ING THE VERDICT

Comes now the defendant, it having heretofore at the close of all of the testimony at the trial hereof, moved the Court for a directed verdict in its favor, which Motion was denied, and thereafter a verdict having been returned by the jury in favor of the plaintiff and against the defendant, and moves that the judgment in favor of the plaintiff on the verdict be set aside and that judgment be entered herein in favor of the defendant notwithstanding the verdict, on the following grounds, to wit:

I.

That the evidence is wholly insufficient to warrant a recovery by the plaintiff, and upon the facts and the law the plaintiff established no right to relief.



## Plaintiff's Exhibit No. 2—(Continued)

## II.

That the evidence wholly fails to establish any negligence on the part of the defendant, or any negligence, either in whole or in part, which was the proximate cause of plaintiff's injuries; plaintiff's evidence fails to establish that the slab of wood which struck the plaintiff resulted from any negligence on the part of the defendant; that the plaintiff did not see the slab in flight until it was 3 or 4 feet from him, and plaintiff's only other witness did not see the slab and knew nothing about it until someone hollered "look out," so that no reasonable inference can be drawn from the evidence that the slab broke off as a result of any negligence on the part of the defendant, whereas defendant's witnesses established by uncontradicted evidence that said slab broke off a log before said log reached the landing or the bunker.

## III.

That plaintiff's evidence with reference to negligence was wholly conjectural and speculative and did not amount to even a scintilla, and there is no evidence that if said log bunker had been free from all substances the accident would not have occurred.

## IV.

The evidence is undisputed that at the time said slab broke off the log, the unloading of said logs from the truck was the normal operation, the same operation that had been followed for many years

## Plaintiff's Exhibit No. 2—(Continued)

and without mishap; that said slab undoubtedly broke off as a direct result of said log having been split while being felled or cut in the forest, but for which the accident would not have occurred.

## V.

The evidence is undisputed that the premises were reasonably safe for the type of operation being conducted and for the type and nature of plaintiff's employment; that the slab breaking off a log and flying in the manner it did was unforeseeable by any reasonably prudent person, for the plaintiff himself, knowing all of the facts and circumstances incident to the unloading of logs, stationed himself at what he thought was a safe distance. If he could not foresee such an unusual occurrence then the defendant should not be held to have been able to foresee it. The injuries to the plaintiff resulted from a mere accident. There is no evidence that plaintiff's injuries were the natural and probable consequences of any negligence or wrongful act on the part of the defendant, or that it ought to have been foreseen in the light of the attending circumstances, or that any negligence of the defendant was a link in an unbroken chain of reasonably foreseeable events.

## VI.

The undisputed evidence shows that the accident was caused solely by the acts and conduct of Bedal and Smith or The Howard and Hallack Lumber

Plaintiff's Exhibit No. 2—(Continued)

Company, or both of them combined, who were performing the operations of unloading and loading the logs and whose duty it was to keep the bunker and immediate premises free of any and all bark or debris.

VII.

The evidence establishes that plaintiff was guilty of negligence which solely resulted in his injuries; the evidence is undisputed that the plaintiff was sitting on the bunker log facing West and was not watching the logs as they were being unloaded; that plaintiff had established himself approximately 60 feet north of where said logs were being unloaded to the tracks, knowing that at times bark or other substance flew off the logs as they were being unloaded, and had he exercised reasonable care and watched the unloading of said logs he could and would have seen the piece of slab break off the log and could have gotten out of harm's way, as did the other persons situated as he was; or if there was foreseeable danger he should have moved farther than 60 feet away.

VIII.

The court erred in refusing to give to the jury defendant's Requested Instruction No. 1, for the reasons herein set forth and for the reasons set forth in the defendant's Motion for a Directed Verdict.

This Motion will be based upon the records and

## Plaintiff's Exhibit No. 2—(Continued)

files herein and the evidence and proof adduced at the trial of said cause, and the minutes of said court.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for the Defendant.

I certify that on March 8th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true, and correct copy of the foregoing Motion for Judgment Notwithstanding the Verdict, enclosed in a sealed envelope, postage prepaid, directed to—

Messrs. W. H. Langroise, and  
W. E. Sullivan,  
Attorneys at Law,  
McCarty Building,  
Boise, Idaho.

that being their last known address.

L. H. ANDERSON,

Of Counsel for Defendant.

[Endorsed]: Filed March 9, 1951.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

ORDER

Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A "Cat" and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.

Whether the operation in driving the trucks to

## Plaintiff's Exhibit No. 2—(Continued)

the top of this steep embankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable. (*Ellis v. Union Pacific Railroad Company*, 329 U. S. 649.)

The motion will be denied, and it is so Ordered.

Dated September 18, 1951.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed September 18, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

## MOTION FOR SUPERSEDEAS

Defendant moves the Court to stay the enforcement of the Judgment in this action pending the disposition of defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of Bond re-

Plaintiff's Exhibit No. 2—(Continued)

quired to be filed by the defendant for such stay and costs.

Dated, October 9th, 1951.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant.

[Endorsed]: Filed October 16, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

ORDER GRANTING SUPERSEDEAS

This matter came on to be heard on Motion of the defendant for a stay pending defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and it appearing to the Court that the defendant is entitled to such stay;

It Is Ordered that the execution of any proceedings to enforce the Judgment entered herein on the 2nd day of March, 1951, be, and the same is hereby, stayed pending the determination of defendant's appeal from such Judgment, upon filing by defendant of a surety bond in the sum of Seventeen Thousand Dollars (\$17,000.00), for such stay and costs on appeal.

Plaintiff's Exhibit No. 2—(Continued)

Dated, October 10th, 1951.

CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed October 16, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

#### NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on March 2nd, 1951.

BRYAN P. LEVERICH,  
L. H. ANDERSON,  
E. H. CASTERLIN,  
Attorneys for Appellant.

[Endorsed]: Filed October 16, 1951.



Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

SUPERSEDEAS AND COST BOND

Know All Men By These Presents, That we, Union Pacific Railroad Company, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto A. M. Powell in the full and just sum of Seventeen Thousand and no/100ths Dollars, (\$17,000.00), to be paid to the said A. M. Powell, his successors, administrators, executors and assigns, to which payment well and truly to be made, we bind ourselves and our successors, heirs, administrators, executors, jointly and severally, by these presents.

Sealed With Our Seals and dated this 15th day of October, 1951.

Whereas, on March 2nd, 1951, in an action pending in the United States District Court for the District of Idaho, Southern Division, entitled A. M. Powell, plaintiff, against Union Pacific Railroad Company, defendant, a judgment was rendered against the said defendant and the said defendant has, or is about to file a notice of appeal from said judgment to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such that if the said Union Pacific Railroad Com-

## Plaintiff's Exhibit No. 2—(Continued)

pany shall prosecute its appeal to effect and shall satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to be and remain in full force and effect.

UNION PACIFIC RAILROAD  
COMPANY,

Principal,

By L. H. ANDERSON,

One of Its Attorneys of  
Record.

[Seal]

CONTINENTAL CASUALTY  
COMPANY,

Surety,

By KEITH G. MOLLERUP,

Its Attorney-in-Fact and  
Resident Agent.

[Endorsed]: Filed October 16, 1951.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

The Union Pacific Railroad Company, defendant, having heretofore filed herein its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, designates for inclusion in the record on appeal the entire and complete record, proceedings and evidence, and requests that you prepare, certify and transmit the same—

That is, all of the original papers in the file dealing with this action or proceeding and the Reporter's Transcript of the evidence and proceedings had during the trial, and the exhibits offered, all in manner required by law and the rules of Court.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing Designation of Record on Appeal, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H.

Plaintiff's Exhibit No. 2—(Continued)

Langroise, Attorney at Law, McCarty Building,  
Boise, Idaho.

L. H. ANDERSON,  
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

### REPORTER'S PRAECIPE

To G. C. Vaughn, Official Reporter:

Will You Please prepare, certify and lodge with the Clerk of the above-entitled Court a transcript of all of the evidence and proceedings at the trial, and at all hearings stenographically reported in this action, within the time, or any extensions of time allowed by Rule 73 (g) of the Rules of Civil Procedure, and the number and manner required by law and Rules of Court.

We agree to pay the charges therefor.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho,

Plaintiff's Exhibit No. 2—(Continued)

a full, true and correct copy of the foregoing Reporter's Praceipe, enclosed in a sealed envelope, postage prepaid, directed to G. C. Vaughan, Court Reporter, Box 1805, Boise, Idaho.

L. H. ANDERSON,  
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

NOTICE TO APPELLEE

To A. M. Powell:

The defendant Union Pacific Railroad Company hereby gives notice of its appeal filed herein on October 16th, 1951, to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered herein on March 2nd, 1951, and of its supersedeas bond in the sum of \$17,000.00, filed with said appeal.

BRYAN P. LEVERICH,  
L. H. ANDERSON,  
Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing

## Plaintiff's Exhibit No. 2—(Continued)

Notice to Appellee, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H. Langroise, Attorney at Law, McCarty Building, Boise, Idaho.

L. H. ANDERSON,  
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

ORDER EXTENDING TIME TO FILE  
RECORD ON APPEAL

It Is Hereby Ordered that the time for filing the record on appeal in the above-entitled cause be, and the same is hereby, extended to and including the 1st day of January, 1952.

Dated, November 19th, 1951.

CHASE A. CLARK,  
District Judge.

[Endorsed]: Filed November 19, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

SATISFACTION OF JUDGMENT

For and in Consideration of the Sum of Fourteen

Plaintiff's Exhibit No. 2—(Continued)

Thousand Five Hundred & No/100 Dollars (\$14,500.00), lawful money of the United States, paid by the Union Pacific Railroad Company, a corporation, defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain Judgment rendered and entered in the above-entitled Court on the 2nd day of March, 1951, in favor of the plaintiff and against the defendant in the sum of \$15,000.00, with costs in the sum of \$92.26, and the Clerk of said Court is hereby authorized and directed to enter satisfaction of record of said Judgment in said action.

Dated, December 15, 1951.

ALBERT M. POWELL.

State of Arizona,  
County of Yuma—ss.

On December 15, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally appeared before me A. M. Powell, known to me to be the person who signed the foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

C. R. CAVANAHA,  
Notary Public for Arizona,  
Residing at Somerton.

Plaintiff's Exhibit No. 2—(Continued)

Com. Exp. 7-29-1952.

[Endorsed]: Filed December 26, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in  
the U.S. District Court for the District of Idaho.

### MOTION TO DISMISS APPEAL

The defendant, Union Pacific Railroad Company, hereby moves the Court under Rule 73 (a) of the Federal Rules of Civil Procedure to dismiss defendant's said appeal, the record not having been docketed in the United States Court of Appeals for the Ninth Circuit.

Dated, December 24, 1951.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant.

### Order

Upon reading and filing the foregoing Motion, and good cause appearing therefor, it is

Ordered that defendant's appeal herein be and the same is hereby dismissed.

Dated, December 26th, 1951.

CHASE CLARK,

District Judge.



Plaintiff's Exhibit No. 2—(Continued)

I certify that on December 24, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing Motion to Dismiss, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H. Langroise, Attorney at Law, McCarty Building, Boise, Idaho.

L. H. ANDERSON,  
Of Counsel for Appellant.

[Endorsed]: Filed December 26, 1951.

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of Complaint, Answer, Verdict, Judgment, Motion for Judgment Notwithstanding the Verdict, Order Denying Motion, Motion for Supersedeas, Order Granting Supersedeas, Notice of Appeal, Supersedeas and Cost Bond, Designation of Record on Appeal, Reporter's Praecipe, Notice to Appellee, Order Extending Time to File Record on Appeal, Satisfaction of Judgment and Motion to Dismiss Appeal in the case of A. M. Powell, Plaintiff v. Union Pacific Railroad Company, Defendant, No. 2776-S, Civil, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

## Plaintiff's Exhibit No. 2—(Continued)

In Testimony Whereof, I have set my hand and affixed the seal of said Court in said District this 16th day of September, 1953.

[Seal]                      ED. M. BRYAN,  
Clerk.

Admitted in evidence, Plaintiff's Exhibit No. 2.

Mr. Anderson: If the Court please, I would like to withdraw from the files in this case Plaintiffs' request for admission dated September 1, 1953, and have it marked as an exhibit.

I offer in evidence Plaintiffs' exhibit 3 which is request for admission, and I would like the record to show that no answers were filed in this Court by Hallack and Howard Lumber Company to these requests for admission and under rule 36 each of the following statements are true. I would be glad to read this now but I assume that won't be necessary in view of the stipulation.

The Court: Any objection?

Mr. Eberle: None.

Mr. Elam: No objection.

The Court: It may be admitted.

United States District Court for the District  
of Idaho, Southern Division

PLAINTIFFS' EXHIBIT No. 3

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

### REQUEST FOR ADMISSION

To the Defendant—The Hallack and Howard Lum-  
ber Company, and to Third-Party Defendant—  
W. O. Bedal:

The plaintiffs, Oregon Short Line Railroad Com-  
pany and Union Pacific Railroad Company, request  
the defendant, The Hallack and Howard Lumber  
Company, and the Third-Party Defendant, W. O.  
Bedal, within ten days after service of this request,  
to make the following admissions for the purpose of  
this action only, and subject to all pertinent objec-  
tions to admissibility which may be interposed at the  
trial:

1. That each of the following statements is true:

(a) That the injuries to the said A. M. Powell  
at Banks, Idaho, on the 15th day of September, 1949,

were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leases premises (Exhibit "A" attached to the complaint).

(b) That the said W. O. Bedal, his agents, servants or employees were using the premises covered by Exhibit "A" attached to the complaint at the time and place said A. M. Powell was injured in unloading said logs from trucks and the loading of said logs onto plaintiffs' cars for shipment by the defendant The Hallack and Howard Lumber Company and for the use and benefit of The Hallack and Howard Lumber Company under an arrangement whereby the said Bedal performed said unloading and loading of said cars at Banks, Idaho, for and on behalf of the said lumber company in place of said lumber company performing said work itself.

(c) That the defendant, The Hallack and Howard Lumber Company, was the owner of said logs being unloaded and loaded at the time and place the said A. M. Powell was injured.

(d) That the defendant, The Hallack and Howard Lumber Company, paid the said W. O. Bedal for the hauling, unloading, and loading of said logs on the premises leased by the plaintiffs to the defendant The Hallack and Howard Lumber Company at the time and place that said A. M. Powell was injured.

Dated, this 1st day of September, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for the Plaintiffs.

I certify that on September 1st, 1953, I served a full, true and correct copy of the foregoing Request for Admission on each the defendant and third-party defendant, by depositing the same enclosed in each of two sealed envelopes, postage prepaid, in the United States Postoffice at Pocatello, Idaho, addressed to their attorneys of record, as follows:

Mr. Oscar W. Worthwine,  
Mr. J. L. Eberle,  
401 Idaho Building,  
Boise, Idaho.

Messrs. Elam and Burke,  
Mr. Fred M. Taylor,  
P. O. Box 2147,  
Boise, Idaho.

that being their last known address.

/s/ E. H. CASTERLIN,  
Of Counsel for Plaintiffs.

[Endorsed]: Filed September 2, 1953.

Admitted in evidence: September 21, 1953.

---

Mr. Anderson: Now, Mr. Clerk, will you please also withdraw from the original file, the answer to these [7] requests filed by W. O. Bedal. So far as our case is concerned I don't know that they are too important but they are a part of the request for admission.

I will now offer in evidence Plaintiffs' exhibit 4, Answer of W. O. Bedal to the request for admission.

The Court: Any objection?

Mr. Elam: No objection.

The Court: It may be admitted.

---

PLAINTIFFS' EXHIBIT No. 4

United States District Court, District of  
Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation,  
Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER  
COMPANY, a Corporation,  
Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

ANSWER OF W. O. BEDAL TO  
REQUEST FOR ADMISSION

In answer to the Request for Admission served herein by the plaintiffs above named, this Third-Party Defendant makes the following answers, to wit:

(a) Admits the statement set forth.

(b) Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit "A" attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party complaint; denies that at said particular time said W. O. Bedal, his agents, servants or employees, were loading logs onto plaintiffs' cars for shipment by defendant, Hallack and Howard Lumber Company.

(c) Admits the allegations of paragraph (c) so far as the logs which were being unloaded; that no logs were being loaded at that particular time or place.

(d) Admits that the defendant, Hallack and Howard Lumber Company, paid W. O. Bedal for the hauling and unloading of said logs onto the said leased premises.

Dated this 9th day of September, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party  
Defendant.

State of Idaho,  
County of Ada—ss.

W. O. Bedal being first duly sworn, deposes and says that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

/s/ W. O. BEDAL.

Subscribed and sworn to before me this 9th day of September, 1953.

[Seal] /s/ FRED M. TAYLOR,  
Notary Public for Idaho.

I hereby certify that on September 10, 1953, I served a copy of the within and foregoing Answer of W. O. Bedal to Request for Admission upon L. H. Anderson, one of the Attorneys of record for the plaintiffs herein, by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

L. H. Anderson, Esq.,  
P. O. Box 530,  
Pocatello, Idaho,

that being his last known address.

/s/ LAUREL E. ELAM.

Service and receipt of a copy of the foregoing Answer of W. O. Bedal to Request for Admission admitted this 10th day of September, 1953.

/s/ OSCAR W. WORTHWINE,



/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

[Endorsed]: Filed September 10, 1953.

Admitted in evidence September 21, 1953.

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EARL W. BRUETT

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Your name is Earl W. Bruett?

A. Yes, sir.

Q. Where do you reside?           A. Nampa.

Q. What is your occupation?

A. Assistant Engineer for the Union Pacific Railroad.

Q. Briefly, what are your duties?

A. Checking of leases and drawing maps, staking leases.

Q. Surveying?           A. Yes.

Q. Making blue prints?

A. Yes, blue prints.

Q. Is Banks, Idaho, on your territory and within your jurisdiction? [8]           A. Yes, sir.

Q. I show you what has been marked as Plaintiffs' exhibit number 5, briefly what is that?

(Testimony of Earl Bruett.)

A. That is a blue print showing railroad track right-of-way and lease to Hallack & Howard Lumber Company at Banks, Idaho.

Q. Is that the same or substantially the same map as attached to the lease, exhibit number 1?

A. Yes, sir.

Q. Is that true and correct as to the physical conditions at Banks?      A. Yes.

Q. And was it on September 15, 1949?

A. To the best of my knowledge, yes.

Mr. Anderson: We offer in evidence Plaintiffs' exhibit number 5.

The Court: If there is no objection it may be admitted.

Q. Mr. Bruett, how is the property of the Railroad Company shown on that print?

A. It is shown with red pencil.

Q. And how is the lease from the Railroad Company to the Hallack & Howard Lumber Company shown on the map?

A. It is outlined in yellow.

Q. Does the map show the railroad track through Banks?      A. Yes, sir. [9]

Q. How many tracks are there?

A. The main line and the loading track.

Q. Which direction do they run?

A. Generally north and south.

Q. The east track is which?

A. The main line.

Q. And the west track?

A. The loading track.

(Testimony of Earl Bruett.)

Q. That loading track is that where they put the cars and load the logs after they are unloaded from the trucks?           A. Yes.

Q. Have you placed on this print some roads that are partly on and partly off the leased premises at Banks?           A. Yes, sir.

Q. Are they put on to scale?           A. Yes.

Q. Incidentally, what is the scale of that print?

A. It is on the scale of one inch to one hundred feet.

Q. The roads that you have shown on the map, how are they indicated?

A. They are shown with a dashed white line.

Q. A paralleled dash white line?           A. Yes.

Q. Do you know what that road is used for, or those roads that you have there?

A. Primarily for logging and for access to the depot. [10]

Q. At one place on the map to the west of the railroad right-of-way line and the leased premises you have some curleycues or whatever you might call them, is that right?

A. Yes, you might call it that.

Q. What does that indicate?

A. That is a clump of trees and brush, growth there.

Q. Will you take a red pencil and mark on that or right opposite that, the word "trees"?

A. Yes.

Q. Where this road or roads are located on this map, what is the general nature of the topography

(Testimony of Earl Bruett.)

there with reference to the railroad tracks, are they higher or lower?

A. The railroad is considerably lower—the roadway is considerably higher than the railroad tracks.

Q. Do you have any figures to show what the elevation is opposite the leased premises to the west as compared with the railroad tracks?

A. Yes.

Q. Will you give us some of those please, starting from either the south or the north end.

Q. Start about 75 feet from the south end into the lease, the elevation of the road is 8.3 feet higher than the railroad track, and a hundred feet more north the roadway is 16 feet higher than the railroad track, one hundred feet further north the roadway is 18.7 feet higher than the railroad track—one hundred feet further north [11] the roadway is 19.6 feet higher than the railroad track and at another 100 feet to the north the road is 23.2 feet higher than the railroad track.

Q. That last elevation that you gave is that in the vicinity of the trees or thereabouts?

A. That would be beyond the trees, further north.

Q. North of the trees?

A. Yes, at about the vicinity of the trees it is 18.7 feet from the roadway to the top of the rail.

Mr. Anderson: I believe that's all.

Mr. Eberle: No cross-examination.

(Testimony of Earl Bruett.)

Cross-Examination

By Mr. Elam:

Q. That varies along there about where the trees are from about 18.7 feet to a little over 20 feet in height?

A. To the north, yes.

Q. Do you know where there is a white marker down here along the railroad track on the opposite side of the railroad track, one of the railroad markers, do you have that on there?

Mr. Anderson: What kind of a marker, Mr. Elam?

Mr. Elam: I don't know whether it is a mile marker or a station marker or what.

A. There is a culvert marker, that is probably what you are referring to.

Q. Where is that with reference to these trees that you are talking about, is that straight [12] across?

A. It would be about 75 or 80 feet to the north, if that is what you are talking about.

Q. North of where you had marked for the trees?

A. Yes.

Q. As a matter of fact there are two batches of shrubs or trees out there, don't you have more than one mark?

A. Not on this print.

Q. You prepared the print? A. Yes.

Q. And you prepared the markings on there?

A. Yes.

Q. Did you see more than one batch of trees or shrubs there on that one side? A. Yes.

(Testimony of Earl Bruett.)

Q. How many were there?

A. Two clumps as I recall.

Q. Two different places? A. Yes.

Mr. Anderson: We have a big map that will show all that, if you want it, Mr. Elam, the reason we used this is because it is attached to the lease.

Mr. Elam: I don't object to this, I am just asking questions about the location of these things.

Q. Now, with reference to the drop there—that is what you mean by the elevation—where the road is down to the track?

A. Yes, to the top of the rail. [13]

Q. To the level next to the railroad?

A. Yes.

Q. And next to the railroad track there is more or less of a level space, is there not?

A. Yes.

Q. Along the railroad track? A. Yes.

Q. Can you give me approximately what the width of that space is? A. It varies.

Q. And would be approximately what?

A. Between 15 and 20 feet.

Q. And then you come to a very substantial slope do you not? A. Yes.

Q. A very steep slope? A. Yes.

Q. And the road is right on the very edge of that slope? A. Yes.

Q. And the logs coming off the trucks, as they fall down, they hit the slope itself there just as it comes over the edge, is that right?

(Testimony of Earl Bruett.)

A. I have never seen them unload logs there so I couldn't tell you that.

Q. Now, do you know how far it is in a horizontal line from the edge of the road to the place where you come down about level?

A. At what place—at about where this clump of trees are. [13-A]

Q. That varies a little bit does it? A. Yes.

Q. Give approximately what it is there then.

A. It is right at 47 feet.

Q. That is the distance down the slope?

A. Yes.

Q. During which you had the drop that you mentioned? A. Yes.

Q. So far as the railroad track is concerned there on your plat you draw the railroad with one line, what is that line?

A. That is the center line of the track.

Q. What is the distance between the center line and the edge of the property, the east side of the property which was leased to Hallack and Howard?

A. From the center of the side track to the edge of the lease is 8.5 feet.

Q. That varies a little bit from the north to the south end but along in where you have designated it is 8.5 is that right? A. Yes.

Q. That is from the center of the track to the leased property? A. To the edge of the lease.

Q. How wide is the track?

Q. Four feet eight and a quarter inches between rails.

(Testimony of Earl Bruett.)

Q. So your leased property would be about a little over six feet from the west line of the rail?

A. Yes. [14]

Q. Have you been up there lately?

A. About a week ago.

Q. Since the Boise-Payette took over that road landing the top of the road has been widened out?

A. It looked like it to me—I didn't check any measurements but it looked wider than it had been.

Q. There had been some bulldozing on the bank side—the west side?      A. Yes.

Q. There had been rocks and debris pushed over the bank and down the hill?      A. Yes, sir.

Mr. Anderson: Is that since the Powell accident?

Mr. Elam: Yes.

Mr. Anderson: I move to strike that and object to it as being immaterial.

The Court: Yes, any alterations or corrections made since the accident would not be material.

Mr. Elam: That's all.

Mr. Anderson: Nothing further.

### GEORGE HIBBARD

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

#### Direct Examination

By Mr. Anderson:

Q. Your name is George Hibbard? [15]

A. Yes, sir.

Q. Where do you reside Mr. Hibbard?



(Testimony of George Hibbard.)

A. Banks.

Q. Have you resided there for some time?

A. Yes.

Q. Where were you working—strike that—were you working at Banks on September 15, 1949, when Mr. Powell was injured?      A. Yes.

Q. Were you acquainted with Mr. Powell?

A. Yes.

Q. Who were you working for at that time?

A. Mr. Bedal?

Q. W. O. Bedal?      A. Yes.

Q. What were you doing?

A. Unloading trucks.

Q. How were you unloading them?

A. With a cat—bulldozer and boom.

Q. Did you operate that yourself?

A. Yes.

Q. At the time in question did you unload the logs?      A. Yes.

Q. At the time Powell was injured?

A. Yes.

Q. Where were you—to the west of the truck?

A. East, on the side. [16]

Q. How did you unload the logs off the truck?

A. With a cable.

Mr. Eberle: We object to that as being entirely immaterial.

Mr. Anderson: It is preliminary but I will not pursue it further.

Q. You operated the cat that unloaded the logs?

A. Yes.

(Testimony of George Hibbard.)

Q. Are you generally familiar with the map, with what the map shows? In other words, can you make a mark on that map as to where the truck was standing when you unloaded the logs from it?

A. Yes.

Q. Will you take a red pencil and make an x where the truck was standing?

The Court: I take it this is the truck that the slab came from.

Mr. Anderson: Yes, that is right.

Q. Now, you have marked an x with a red pencil about opposite a clump of trees that was there?

A. Right close.

Q. And where you marked with an x is where the truck was standing when you unloaded the logs immediately following which Mr. Powell was injured? A. Yes. [17]

Mr. Anderson: If your Honor thinks that I should not go into these things, of course, I will not do it but I would like to ask a few questions.

The Court: Go ahead Mr. Anderson.

Q. When these logs were unloaded off the truck and the ones in question, that is, when Mr. Powell was injured, would they be pushed to the west or the east toward the track?

A. Yes, toward the track.

Q. What was done with these logs after they were unloaded?

A. They would be loaded on the cars.

Q. Do you know whose logs they were—who owned the logs? A. Hallack & Howard.

(Testimony of George Hibbard.)

Q. Who was hauling the logs, unloading them and loading them for Hallack & Howard?

A. Bedal.

Q. Did the Railroad Company have anything to do with that operation?

Mr. Elam: We object to that as incompetent, irrelevant and immaterial. A. No.

The Court: He has answered it and the answer may stand.

The Court: We will recess until 2 o'clock this afternoon.

September 21, 1953, 2:00 P.M.

Mr. Anderson: I have no further questions, [18]

Mr. Eberle: We have no cross.

### Cross-Examination

By Mr. Elam.

Q. Mr. Hibbard, I think one thing that should be cleared up in regard to unloading the logs, I believe you said that you used a cat in unloading them? A. Yes.

Q. How did you use the cat?

A. To pull off with the line and boom.

Q. That was for the purpose of pulling the chains or the lines so the logs would be loosened?

A. Just to dump the logs over.

Q. Which side of the load of logs would you be on? A. I would be on the west.

Q. That is on the opposite side of the load of logs from where the railroad cars were down below?

(Testimony of George Hibbard.)

A. Yes.

Q. You were doing that in the same manner that you had always done it before?

Mr. Anderson: I object to that as immaterial.

A. Yes.

The Court: The objection is sustained and the answer may be stricken.

Q. And you fix the place at about where you marked it there on the map? A. Yes. [19]

Mr. Elam: I think that is all from this witness at this time, we may want to call him later.

I would like to recall Mr. Bruett for a question or two.

#### EARL W. BRUETT

recalled for further cross-examination, having heretofore been duly sworn, testifies as follows:

#### Cross-Examination

By Mr. Elam:

Mr. Elam: I will ask that Mr. Bruett be handed the map exhibit 5 which is admitted.

Q. I will ask you if you will mark on the blue-print as the place designated as the trees and identified by both you and Mr. Hibbard, the height of the road over and above the railroad track, what is that? A. That elevation is 18.7.

Q. Will you mark that on that print in red pencil. A. Yes, sir.

Q. That is the height of the edge of the road above the level of the railroad track?

A. Yes.

Mr. Elam. That is all.

Mr. Anderson: I would like to have this marked as an exhibit, this is exhibit 6.

At this time, if the Court please, I offer exhibit 6 which is a statement of expenses and attorneys fees incurred by the Union Pacific Railroad Company in the [20] Powell case, and in connection with this exhibit we have entered into this stipulation. "If the plaintiffs or either of them are entitled to recover in this action it is hereby stipulated by and between the parties hereto through their respective counsel that the items listed on the attached exhibit were expended by the plaintiff or one of them in the case of A. M. Powell vs. Union Pacific Railroad Company, and the same may be received as evidence in this case subject only to any objection that may be made and the ruling thereon by the Court as to relevancy or materiality as to any or all items.

It is further stipulated that as to two of said items, that is the claim agent's time in the amount of \$301.97 and the attorney's fee in the amount of \$1,000.00, said items were incurred by regular employees of the plaintiff and said amounts were determined by auditing the hours and days worked by said employees and the charge therefore made according to their regular monthly or annual salary. I offer exhibit 6 in evidence.

The Court: Without objection it may be admitted.

## PLAINTIFF'S EXHIBIT No. 6

Statement of Expenses and Attorney's Fee Incurred by the Union Pacific Railroad Company Covering the Investigation, Defense, Appeal, and Final Disposition of the Case of A. M. Powell vs. Union Pacific Railroad Company, Case No. 2776, in the United States District Court for the District of Idaho, Southern Division:

Claim Agent's Time .....	\$ 301.97
Claim Agent's Expense .....	51.12
Witnesses at the trial—Time and Expense	216.09
Marshal's Fee—Serving subpoenas ....	20.10
Transcript required by Court on Motion for Judgment Nov. ....	182.70
Appeal Fee .....	5.00
Premium on Bond on Appeal .....	300.00
Attorney's Fee .....	1,000.00
Paid in Satisfaction of Judgment .....	14,500.00

Admitted in evidence September 21, 1953.

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Mr. Anderson: I have had the transcript in the case of A. M. Powell vs. Union Pacific Railroad Company marked as Plaintiff's Exhibit 7 which is a transcript of the evidence and other proceedings of the Court in that case, motion for directed verdict and instructions. I would like to read at this time

portions of the testimony. [21] I offer this in evidence at this time.

The Court: It may be admitted.

Mr. Elam: I think the ones that were not stipulated to were Powell and Anne Powell.

Mr. Anderson: I don't propose to read Anne Powell's.

Mr. Elam: And Russell Eldridge and Addelore Revett, Dr. Simonton, Boyd Tovey. The only ones that we stipulated that could be read into the record was the testimony of Harry Hansen, Ritter, Parrish, and Sage.

The Court: This will be admitted as against the Hallack & Howard Lumber Company.

Mr. Anderson: I would like to read from the testimony of Albert M. Powell, commencing on page one of the transcript.

The Court: I might say if there is any portion of this which would save a duplication in again reading it to the jury that you have no objection to, it might save you a little time and save the Court time and the jury's time if you would specify the ones that you don't have objection to. That might save the reading of it twice, because I am now principally concerned with the case of the Union Pacific against the Hallack & Howard Lumber Company, but I am letting this testimony go in as to all of the parties so as to save duplication.

Mr. Elam: The stipulation was made between all of the attorneys as to those particular witnesses.

The Court: What are the names of those particular witnesses. [22]

Mr. Worthwine: It was stipulated as to the testimony of Harry F. Hansen, Charles Ritter, Albert Parrish and Howard Sage.

The Court: That testimony may be admitted as against all of the parties to the suit, and any balance of the transcript that you desire to use may be used only as to the Hallack & Howard Lumber Company.

Mr. Elam: We will also stipulate that the instructions which are a part of the original transcript may be admitted.

The Court: I am very sure that the instructions in this case are going to be different than the instructions in that case. They may be admitted however, if there is no objection. You may proceed, Mr. Anderson.

(Mr. Anderson reading.)

ALBERT M. POWELL

being called as a witness by the plaintiff, after being duly sworn, testifies as follows:

Direct Examination

By Mr. Langroise:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Who were you employed by on the 15th of September, 1949?

A. The Union Pacific Railroad Company.

The Court: Mr. Anderson, I don't want to interrupt you, but I have an idea that all counsel [23] are going to be faced with this situation that you



(Testimony of Albert M. Powell.)

are faced with now, if some of counsel would act as a witness for you and take the place of Mr. Powell, it would be easier for the jury to follow.

Mr. Anderson: That is right and it is the proper procedure except for the fact that I am jumping from portion to portion and it might be difficult for them to follow me. I will try to make it plain which is the question and the answer.

Q. Who were you employed by on September 15, 1949?      A. Union Pacific Railroad Company.

Q. And where were you located?

A. Banks, Idaho.

Q. What was your position?

A. I was car inspector.

Q. And what were your duties as car inspector?

A. To make repairs to damage to log cars.

Q. Had you been employed by the Union Pacific Railroad Company prior to September 15th?

A. Yes, sir.

Q. When did you start to work for the Union Pacific Railroad Company?

A. It was either 1934 or 1935.

(Now I will go to about the middle of page 3.)

Q. At Banks, Idaho, during 1949 were any logs being loaded there?      A. Yes, sir. [24]

Q. When did you go to work at Banks?

A. June first.

Q. Of what year?      A. 1949.

Q. When you went up there were any logs being

(Testimony of Albert M. Powell.)

loaded there?           A. Yes, sir.

Q. Will you just describe to the Court and Jury how the logs were loaded?

A. There was a track running north and south, the same way as the main line, a side track that was practically straight with a little curve, and about three feet or a few feet west of this was a row of bunker logs, two feet or three feet logs, laid in a row, those bunker logs were to keep the logs from rolling across the track or against the cars. The trucks would come in west of that on a little private road, and there they would, with a caterpillar and hoist unload the trucks, each truck load may have from three to six thousand feet in a load and they would knock the chains off the binders and the caterpillar would wind this drum, when they would hitch to the bottom, would wind the drum and lift the load off the trucks and then that load of logs would roll down and hit the bumper logs and they would stop if the bunker logs stopped them. They had a loading machine on a flat car that propelled itself, it would load one-half a flat car and back itself up by cable and he could reach out and get the logs with two men [24-A] swinging them, he could load them on the car and take two binders on the loads of logs and that would form the tension that held the logs. My duty was to inspect this load as to being safe for the company to haul to Cascade. I don't know the distance exactly to Cascade. I was around there to either accept it or to reject it after it was loaded. After he had loaded one half of the

(Testimony of Albert M. Powell.)

car and put the binders on, then he would back up one half a car length and load the rest. That was a day's work just to do that over and over, dumping the loaded trucks and picking them up and loading them on the cars.

(I am skipping a couple of lines.)

Q. How high above the bunker logs was the place that they unloaded from the trucks?

A. From where the trucks were?

Q. Yes, sir.

A. Well, it would vary, there was a variation in the road, the road wasn't straight and that distance would vary from 70 to possibly over 100 feet. It was a very steep incline, you couldn't hardly walk up there, you would have to turn and go up sideways in some places because it was so steep.

(Now I go to page nine of his testimony.)

Q. Is that loading track within two or three feet of the bunkers?

A. Yes, sir. [25]

Q. While you were employed there at that time prior to September 15th, did any more bunker logs make their appearance at this loading place?

A. Yes, the bunkers filled up and they added another log at the top.

Q. Prior to the 15th of September, 1949, how many bunker logs did they have about the middle of the bunker?

A. Three.

Q. And that would extend that bunker how high from the ground or the track?

(Testimony of Albert M. Powell.)

A. Well, logs were two and half or three feet, and the largest they could find, and that would run it above the track six or eight feet.

(I am now going to the bottom of page 10.)

Q. And what was the condition of the area immediately back of the bunker logs?

A. You mean between the bunker logs and the track?

Q. No, I mean the other way.           A. West?

Q. Yes.

A. It was filled up with debris, limbs, small logs and bark.

(Now I am going to page fourteen, toward the top.)

Q. I direct your attention to the 15th of September, 1949, and will ask you to describe to the jury the condition of the debris and materials back of the bunker logs with respect to the top? [26]

A. It—that is, the trash and debris and bark and so on was up to the top of the bunker logs and in some places it was spilling over behind, between the bunker and the cars.

(I am now going to page 15, toward the bottom.)

Q. On the morning of September 15, what time did you go to work?           A. At eight o'clock.

Q. Where did you first go to work?

A. Around the string of cars. I had possibly

(Testimony of Albert M. Powell.)

two or three loads on the south end of the track. I made a minor repair or two on some loads and then I went up on the hill, on the road, and got a drink of water and walked off down to the north end of this train of cars, this string of cars that was standing there, and go on top and walked on top of the empty cars to inspect the chains, the "U" plates and chains and walked up to the empty car next to this loading machine, the loading rig was on the next car.

Q. Where was the loading rig with respect to the loaded cars?

A. There was loaded cars in front of the loading rig, possibly six or seven, I can't remember, but there was loaded cars in front of it. I stopped on the last empty car next to the car that he was on, he occupied one car with this rig, and then I figured this load of logs was being dumped.

Q. Did you do anything?

A. Did I see any damage, is that what you mean? [27]

Q. No—you say that you got on the car where the loading rig was?      A. Next to it, yes, sir.

Q. Did you notice anything above, any truck?

A. A load of logs ready to be dumped, yes. There was a load ready for dumping, or in the act of dumping.

Q. And what did you do?

A. I stepped up off the top of this log car on to where the bunker logs came together. I stepped on the bunker log and stood there a minute on the

(Testimony of Albert M. Powell.)

end of the bunker log facing the west where they were loading.

Q. What was the bunker log's height with respect to the empty car, the top of the empty car?

A. Oh, possibly two feet or more at that point.

Q. I beg your pardon.

A. They were about two feet or more at that place.

Q. Lower than the empty car?

A. No, higher than the empty car, possibly two feet.

(Now, I am skipping the next question, this is on page 17.)

Q. On to the bunker logs?

A. Yes, and I sat down on the top of the bunker logs in this position (indicating) with my feet on the end of another log sticking out.

Q. Will you explain or describe how you were able to sit on the top facing west?

A. That is right, and I sat on the top facing west. [28]

Q. And still have your feet on the bunker logs?

A. They didn't close up tight there, there was a space of two or three feet that they lacked coming together. You could walk between them, there would be a little space, a sort of partition where the bark and stuff would sift down on to the track.

Q. On ahead of this loading machine, up ahead I mean from the direction that you were walking, what was on the car next to it?

A. Ahead of the loading machine?

(Testimony of Albert M. Powell.)

Q. Yes. A. Logs.

Q. Where was the trucks on the road that had the load of logs on it with respect to where you went over to sit down?

A. It was between 60 and 70 feet south of me, maybe 70 or 80 feet, and it was west up on this road.

Q. About 60 feet south? A. Yes, sir.

Q. And where was that with respect to the loaded cars on the loading tracks? A. From me?

Q. Where was the truck?

A. It was directly or almost directly west of that 70 or 80 feet and up this bank.

Q. Would that be directly up hill?

A. That is right. [29]

Q. Down at the bottom of the bunker, on this track was loaded cars of logs?

A. That is right.

Q. Was there anything else there?

A. I don't just understand.

Q. Why didn't you step up to this bunker and sit down on it or rather why did you do that?

A. Well, that was as far as I could go because of the loading rig, it was on the next car, and I knew that he would want some of those logs that were being dumped to finish out the half car.

Q. They were not being dumped at that time?

A. They were just preparing to dump them, that was as far as I could go. Naturally, I would step out of his way, he had a line to pull him back when he loaded one-half a car.

(Testimony of Albert M. Powell.)

Q. The logs would be loaded—strike that—where would you be when they were unloaded off the truck?      A. You mean at that time.

Q. Well, generally?

A. I would get in a safe place.

Q. You didn't go below the bunker where they were unloading logs?      A. No.

Q. After you stepped over there was anyone else over there at that time?

A. There was three other men, three men on this top bunker log. [30]

Q. When you stepped over?      A. Yes, sir.

Q. Who were they?

A. Mr. Ritter, Mr. Hansen and Mr. Parrish, that I know.

Q. And where were they in relation to you?

A. They were either sitting or squatting on this bunker log.

(I am now turning to the top of page 20.)

Q. You say that you were facing west?

A. Yes, sir.

Q. That would be in the general direction of the loaded cars?      A. Yes, sir.

Q. And what happened, if anything?

A. I just stepped up and sat down this way (indicating) on the end of the log. There were these three men here to the right, the truck dumped the logs and I looked back down the track on the loads and I heard the logs strike the loaded cars, I remember looking at the rig boom and it was quiver-



(Testimony of Albert M. Powell.)

ing after this lick. I am sure that Mr. Ritter yelled "look out there" and I looked, I glanced and threw my head over to one side, there was a slab coming through the air, three or four feet from me, coming from the south. I threw my arm up this way (indicating) and it hit me here (indicating). It hit and raised me in the air. I remember falling back and I remember my feet being higher than my hands. I fell down between the bunker bottom as I went down. [31] I struck my back, between my back and the hip, and then I rolled over on my stomach and crawled out between the cars. On the east side of the cars I pulled up to the side of the car and took a few steps in the direction of my home and I began to see black things in front of my eyes and I got dizzy. I made it back and I laid back over on the car, I think it was the car that the loading rig was on. An employe, Mr. Hansen, who was operating the loading rig came to me and got me by the arm and said "you better go to the doctor" and I said "no, I will go home and rest a while and I will be all right," and then I just passed out for a few moments. I got very sick to my stomach and Mr. Hansen put me in the car and Mr. Ritter drove me to Emmett to the Emmett hospital.

(Now I skip a couple of questions, to the bottom of page 21.)

Q. Well, when you saw it, that is, the slab, from what direction was it coming?

(Testimony of Albert M. Powell.)

A. Directly from the left or the south.

Q. That would be in what relation to the position of the loading track where the cars were on the truck, and the empties?

A. The loading track running north and south?

Q. Yes. Do you remember, the loading track also runs north and south?      A. Yes.

Q. And this came, the slab, from the south? [32]

A. Yes, sir.

Q. And do you remember what time you arrived at Emmett?

A. It must have been about 11 o'clock.

Q. What time did this accident occur?

A. Around ten o'clock.

Q. Upon your arrival there, what doctor, if any, saw you?      A. Dr. Reynolds.

(Now I am going to page 48, this is cross-examination by Mr. Anderson.)

### Cross-Examination

By Mr. Anderson:

Q. The tracks, that is the railroad at Banks runs generally north and south?      A. Yes, sir.

Q. And in addition to the tracks, that is, the rails that the through train goes on, there is a loading track immediately to the west of the main line?

A. Yes, sir.

Q. And is that where the logs were loaded—strike that—is that where the empties are placed for loading the logs?      A. Yes, sir.

(Testimony of Albert M. Powell.)

Q. Do you know how many cars that track, the loading track, will hold?

A. Eighteen or twenty.

Q. When they commence to load these cars do they have to move those after they are loaded, or do they dump to one car. [33] And when that car is loaded, do they dump to the next?

A. They try to start on the extreme south end and load on up toward the north.

Q. So that the truck up on the road would try to dump the logs to the particular car that is being loaded at that time?

A. Wherever they need the logs.

Q. And that road to the west of the load track, the road that the trucks went on, was that road continuous from the north end of the loading track to the south end of it?

A. Yes, sir, it is continuous—well, it branched off to the north but I would say it was continuous, yes.

Q. That was the road that these trucks would pull on and then they would dump the logs to whatever railroad car they were loading?

A. Yes, sir.

Q. And is that road all the way, all the way through there for 18 or twenty cars, car lengths, that road on the hill, that is my question?

A. Yes, up quite a ways.

Q. And on this particular date, the 15th of September, 1949, do you know which car you were load-

(Testimony of Albert M. Powell.)

ing, was it north or south or about the middle of that loading track?

A. It was a little south of the middle.

Q. And from that point, where the truck was on the road, was that higher or a lower elevation—let me change that, was it at the highest or the lowest elevation that the [34] truck could be on that road?

A. Well, I would say it was just about intermediate, it could be a little higher to the north and it could be a little lower to the south.

(I am skipping one question and answer.)

Q. Who was it that hauled those logs in there, the logs that were to be loaded?

A. I was the logging company Bedal and Smith.

Q. The railroad company had nothing to do with that?

A. No, they didn't have anything to do with them.

Q. About how far would you say it was from this bunker west of the track up to where this truck loaded with logs would be?

A. I think I would be safe in saying that it is between 70 and 90 feet.

Q. You never measured it?

A. No, sir, I didn't.

Q. Would you say the road where the truck was standing and dumping the logs was about 20 feet higher than the level of the tracks?

(Testimony of Albert M. Powell.)

A. I would be unable to say exactly the distance it was higher, I know it was awful steep.

Q. I was wondering if you had any judgment on that?

A. Well, I would be unable to figure the exact height, but it would be 20 feet, I know that, it would be twenty feet up that steep hill to reach this road. [35]

Q. Would you say it would be 25 feet higher than the tracks there?

A. Yes, I would say at least that.

(I am going to the top of page 53.)

Q. And the purpose of the bunker was to protect the cars, to stop the logs and to protect the cars from being damaged, and to hold them for the purpose of loading them on the cars?

A. To stop the logs from hitting the cars and to stop them from going on to the main line and to damage anything or anybody on the other side.

Q. Who put those logs in there?

A. The logging company.

(I am skipping a couple of questions.)

Q. From the bunkers back to the west, toward the hill, where they dumped the logs, how far would this be level from the bunker back toward the hill, that is, is this bark and stuff that has been mentioned, is that level for some distance before you get to going up the slope of the hill?

A. It is level for a foot or two from the top of

(Testimony of Albert M. Powell.)

the bunker, from the top of the bunker log west it is level for about a foot or two and then there would be a dip there, a kind of ditch, then it was level to the extreme foot of the hill, and then, of course, nothing could congregate on this steep hill.

Q. Mr. Powell, how far is it from the bunker to the foot of the hill?

Q. Well, it would vary from 20 feet, that was their working [36] space, about 20 feet wide.

(And then on page 56 near the top of the page.)

Q. And those logs were shipped to Cascade?

A. Yes, sir.

(Near the bottom of page 58.)

Q. Who did clean this logging landing?

A. The logging company.

Q. And what was that company's name?

A. Bedal and Smith.

Q. And what did they do when they cleaned the landing out, did they throw it over the tracks toward the river, toward the east?

A. Yes, sir, for a thorough cleaning they would bring in a carry-all and would clean it plumb down to the river and lay all of the bunker logs up there, that is, they got them out of the way and would make a clean sweep.

(Near the bottom of page 63.)

Q. And the first thing that you knew about this was, that is, the first thing that you knew about this

(Testimony of Albert M. Powell.)

piece of log or slab was just the instant before it struck you. I think that might have been three or four feet away, just in time to throw up your arms?

A. Yes, sir, that is right.

(Page 65 near the middle.)

Q. You were generally looking to the west and someone shouted when this piece started to fly through the air? [37]

A. Yes, sir, I was looking southwest at this load.

Q. Toward the truck?

A. Yes, sir, they hit the car, I had just arrived there about a half minute and somebody shouted.

(Page 69—this is re-cross.)

Q. You did know that particular piece of ground leading from the tracks up to the road for a length of 18 or 20 cars was all leased to the Howard and Hallack Lumber Company? A. No, sir.

Q. They were doing all of the unloading, or Bedal and Smith was doing it for them?

A. Yes, sir.

Q. They were the Howard and Hallack Lumber Company logs? A. Yes, sir, I think it was.

Q. And they supplied the bunkers did they not?

A. The bunkers were supplied or built of the largest logs they could get.

Q. Yes, but they were located there by the lumber company or by the logging company?

A. Yes, sir, by the logging company.

Q. And the cleaning out of the debris was done by the logging company? A. Yes, sir.

(The next is the testimony of Harry F. Hansen at page 98 of the transcript in the case of Powell vs. Union Pacific.) [38]

HARRY H. HANSEN

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Langroise:

Mr. Worthwine: This is the testimony of one of the witnesses that was stipulated to by counsel.

The Court: Yes, this goes to all of the parties.

Q. Where do you reside, Mr. Hansen?

A. Boise, Idaho.

Q. During the summer of 1949 where were you employed?

A. At the Bedal-Smith Logging Company at Banks, Idaho.

Q. And what were your duties there?

A. Loader on the train at Banks.

Q. In connection with your duties did you operate what has been described as the loader that operated on the cars that loaded the railroad train?

A. Yes, sir.

(Now, I go to page 101 just below the middle of the page.)

Mr. Elam: I think this all should be read and



(Testimony of Harry H. Hansen.)

I will stipulate that all this testimony should be read. It isn't very long.

The Court: Very well, read it all.

Q. And were you so engaged on June 1, 1949?

A. Yes, sir.

Q. Had you been there some time before June 1, working there? [38-A]

A. Yes, sir.

Q. How long?

A. I think it was about the 7th of May that I was employed.

Q. Did you work there from the 7th of May to and through the 15th of September, 1949?

A. Yes, sir.

Q. Are you acquainted with the Plaintiff A. M. Powell?

A. Yes, sir.

Q. Did you see him in connection with your work at Banks from June 1st including September 15, 1949?

A. Yes, sir.

Q. Did you know what he was doing?

A. Yes, sir.

Q. What was he doing?

A. He was car inspector or car man.

Q. For whom?

A. The Union Pacific.

Q. What did you observe him doing around there?

A. He always checked the loads every morning and took care of his train or the cars.

Q. Did he, on occasions, repair cars?

A. Yes, sir.

Q. Was he continuously so engaged, working there while you were there from June 1st on?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

Q. What did you observe about his physical condition during [39] that time?

A. He was about to perform his job.

Q. And did he do so?           A. Yes, sir.

Q. What did you observe about whether he was active?           A. He was normally active.

Q. Did you hear some testimony in connection with this large railroad jack or jacks?

A. Yes, sir, I did.

Q. Have you seen them?           A. Yes, sir.

Q. Did you hear a description of them given?

A. Yes, sir, I did.

Q. Have you had to handle any of them yourself?

A. Yes, sir, I have lifted them, and they are awful heavy.

Q. Have you seen him, Mr. Powell, handle those jacks?           A. Yes, sir.

Q. Was there an occasion that you recall when the trucks under one of the loaded cars was knocked off the rails?           A. Yes, sir.

Q. Do you know whether those trucks were placed back on the rails?           A. Yes, sir.

Q. By whom?           A. Mr. Powell.

Q. Did he have help to do that? [40]

A. Yes, he did it alone.

Q. My question was, did he have help?

A. He done it by himself, it was his job and he did it.

Q. While he was there did you see him using

(Testimony of Harry H. Hansen.)

those heavy jacks?           A. Yes, sir.

Q. Did he have difficulty in handling them?

A. Not that I saw.

The Court: I am wondering if you want all of this read as to the condition of Mr. Powell's health and his injuries, that has nothing to do with this case.

Mr. Elam: No, I don't care about that part.

The Court: I am wondering if you want to take the time to read all that.

Mr. Elam: No, not about Mr. Powell.

The Court: This is a simple question involved here and all this has been settled in another case. Do you want him to leave out that part of it or do you want him to continue to read.

Mr. Elam: No, not that portion.

The Court: I suggest that Mr. Anderson go ahead the way he was doing and any part of it that he doesn't read and you want to read that you do so.

Mr. Anderson: Then I will start in the middle or just below the middle of page 101.

Q. Of what did that bunker comprise—of what was it made?

A. It was a large log or logs that were used there. [41] We set it there for the protection of the cars and to keep the logs from coming against the tracks.

Q. What size were those logs in the bunker?

A. I would say about three feet in diameter.

Q. From the time that you started to work there

(Testimony of Harry H. Hansen.)

up to and including the 15th of September, 1949, had the number of logs in that bunker increased?

A. Yes, sir.

Q. About how many were there on the 15th of September and for sometime prior thereto?

A. Just before, it was about three deep, they were large sized logs.

Q. Three large sized logs?

A. Two or three.

Q. Why were a number of logs placed one on top of the other, if you know?

A. They were laid there to keep the bark and stuff from coming over and down on the track and to stop the logs from coming on the track.

Q. But if you started out with one why was the second and the third put on?

A. They put them on as the landing filled up.

Q. As the landing filled up behind the bunkers?

A. Yes, sir.

Q. Directing your attention to the 15th of September, 1949, what [42] was the condition of the landing behind the bunker logs about the center part or a little to the south of the center, as to what condition there was back of that?

A. Well, we had bark formation and dirt filled up, it was filled with bark.

Q. And what was the situation prior to the 15th of September, 1949, as to whether or not this bunker was stopping the logs as they were unloaded from the trucks?

(Testimony of Harry H. Hansen.)

A. Well, when the new bunker was put in it had more stopping force than when it filled there.

Q. After these three, or the third log was put on, how long had it been filled in back of that prior to September 15, 1949?

A. It filled up gradually as they worked on.

Q. Was it filled prior to September 15, 1949?

A. Yes, I would say that it was filled at that time.

Q. How long had it been filled prior to the 15th of September, 1949?

A. Not over a week or so.

Q. After it had filled up, what was the condition with respect to the logs going over this bunker when they were unloaded from above?

A. Well, we had trouble with the logs coming into the flats, into the railroad cars.

Q. Was that just once in a while or was it frequently?

A. It was a general condition more or less. [43]

Q. That had been true for a week or more before the 15th of September, 1949?

A. It happened all of the time, all through the operation since the bunker filled.

Q. Whenever the bunker got filled this would occur?      A. Yes, sir.

Q. How long had it been occurring as you say, I believe—did you say all of the time after this third log was put in the bunker in the area around the center of the bunker and south of the center?

A. A week or two, I would say.

(Testimony of Harry H. Hansen.)

Q. Directing your attention to the 15th of September, 1949, were you at work that day?

A. Yes, sir.

Q. Was Mr. Powell at work that day?

A. Yes, sir.

Q. Where was Mr. Powell working on his repair work generally?      A. On the railroad siding.

Q. Where would that be with respect to the bunker logs that we have been discussing?

A. His work consisted of fixing the cars. Normally his work would be on the side where they were knocking off the stuff.

Q. That is on the side next to the bunker?

A. Yes, sir.

Q. How far was this bunker away from the cars themselves? [44]

A. Well, it varied in distance from one foot to about three feet.

Q. It would vary from one to three feet?

A. Yes, sir.

Q. Do you recall or were you present when Mr. Powell was injured that day?

A. Yes, sir, I was.

Q. Calling your attention to just prior to his injury—prior to the time he was injured, where were you at that time?

A. I was just about six feet from him.

Q. About six feet from him?

A. Yes, sir.

Q. Were you on the logs, or where?

A. On the same log that he was on.

(Testimony of Harry H. Hansen.)

Q. Then I take it you were about six feet north of him? A. Yes, sir.

Q. Was there anyone between you and Mr. Powell? A. Yes, sir.

Q. Who?

A. I think there was two men, Mr. Ritter and Mr. Parish.

Q. Where were they with respect to this log?

A. They were on it too.

Q. Was this the top bunker log?

A. Yes, sir.

Q. Where was your loader with respect to where you and Mr. Powell and the other men were on this log? [45] A. Over to the south of us.

Q. The loader was south of that?

A. Yes, sir.

Q. How much room did this loader take?

A. It occupied one car.

Q. And what was to the south of the loader?

A. Loaded cars of logs.

Q. When did Mr. Powell,—did you see where Mr. Powell came from when he got on the log of this bunker?

A. I would not be able to answer that, I was on the machine on the other side at that time, and I just entered or came there myself. I had come around the machine prior to the accident and stopped on the log myself.

Q. Was Mr. Powell there?

A. He just came there too.

Q. About the same time that you did?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

Q. What direction were you facing, if you remember?      A. I don't remember that.

Q. What was the reason for your coming on the log or going around there—was there anything being done there?

A. Well, we shut the machine down waiting for them to dump a load of logs.

Q. And they were dumping a load of logs.

A. Yes, sir.

Q. Where? [46]      A. Off the truck.

Q. And that truck where they were dumping was above where this bunker was?      A. Yes, sir.

Q. It was on the road that has been described here by witnesses?      A. Yes, sir.

Q. What happened shortly after this load of logs was dumped?

A. To describe it, shortly after the load was broke down someone hollered "look out" and I jumped up and this slab—I didn't see it at the time, but I saw it knock him off this log and the remainder of the load come down against the cars.

Q. The railroad cars, you mean?      A. Yes.

Q. Describe what you saw happen to Mr. Powell after this slab hit him?

A. Well, it knocked him off the log and his head hit the frame of the car and it doubled him up and he fell down between the car and the brow of the hill. He turned over and crawled off under the car and I went over the top and met him on the other side.



(Testimony of Harry H. Hansen.)

Q. What did you observe about his condition at that time?

A. He was hurt. I noticed that right away.

Q. What did you do, if anything, and what did he do?

A. Well, I convinced him that he needed medical aid and with the aid of the other fellows we got a car down and sent him to the doctor. [47]

Q. While he was there what did you observe about his condition?

A. I examined his back and there was a large skinned place on his hip and he was kind of in a semi-coma there, and for a few minutes he was not able to stand, he was weak from shock.

Q. He was loaded in a car and sent away immediately?

A. Yes, sir.

Q. Did you examine this slab that hit Mr. Powell?

A. Yes, sir.

Q. Would you describe it to the Court and Jury?

A. Well, in length it would be nearly four feet long and probably weigh between 60 and 75 pounds.

Q. After Mr. Powell was injured and was taken away in a car, did you remain there for a while?

A. Yes, sir.

Q. Do you remember how long you remained there?

A. Oh, I would say until two-thirty in the afternoon.

Q. Between the time of the unloading of this truck load and the injury to Mr. Powell, had any-

(Testimony of Harry H. Hansen.)

thing been done to change the physical condition of the bunker where the logs were unloaded or the area immediately back of them?

A. Well, I am positive that we loaded a half car of logs.

Q. Did anyone do anything to change the amount of debris back of the bunker logs after this accident happened and during the time you were there?

A. No. [48]

(The following is cross-examination.)

Q. What did you say was done after the accident, did you say you loaded one car?

A. I think the load in question was loaded.

Q. You finished loading one load?

A. Yes, sir.

Q. How many logs would that be?

A. Well, it would vary from 20 to 25.

Q. And those likewise were dumped from the truck up on the road and rolled down?

A. Yes, sir.

Q. Did they stop on the landing west of the bunker logs?      A. Not all of them.

Q. Some of them did?

A. The majority of them, yes.

Q. How did you go about loading those logs?

A. We used a log jammer, a swinging machine. We used a log jammer in loading them.

Q. How did that take the logs, this machine—the process loading, how did that take place, did

(Testimony of Harry H. Hansen.)

you hook on to the end of the log or the middle of the log?

A. We used a crotch line and we hooked hooks on each end.

Q. Those logs swung back and forth a little?

A. Yes, sir, they did.

Q. And as you loaded them on the car they would tear up the landing to some extent? [49]

A. Yes, sir, they would.

Q. They would make sort of a dip in the landing as a result of the log loading operation?

A. Just the drag of the log as you picked it up.

Q. Where you picked the logs up there on the landing the bark is rather loose?

A. Yes, sir, it is.

Q. It is soft material?           A. Yes, sir.

Q. So that having done that, the condition might have been somewhat different than it was at 10 o'clock in the morning at the time of the accident?

A. Not in the general area because it was a very minor operation, just a minor happening.

Q. How far back to the west of the bunker would you determine that the landing extended, would it extend back to the slope?

A. I didn't get that question.

Q. West of the log bunker there is what you call the landing?           A. Yes, sir.

Q. And is that what had bark in?

A. Yes, sir.

Q. How far did that extend back west of the bunker log?

(Testimony of Harry H. Hansen.)

A. Twenty or twenty-five feet approximately.

Q. Would it extend back to the level, the base of the slope of the hill where the logs are dumped.

A. Nearly so. [50]

Q. As I understand it you were on this log about six feet from Mr. Powell, to the north of him, how far were you north of the loading machine?

A. I would say that I was about 12 feet.

Q. Where was the loader with reference to the logs that came down off the truck to the log bunker?

A. A little bit north of that.

Q. Your loader was how long?

A. Forty feet.

Q. I think on direct testimony you said that you didn't remember which way you were facing as you sat on this log bunker?

A. That is correct.

Q. You didn't see this slab in flight?

A. That's right.

Q. When did you first see it, the slab?

A. When some one hollered, I jumped up and looked, and that instance I was facing that way, after he hollered I noticed it.

Q. About the time it struck Mr. Powell?

A. Yes, sir.

Q. So that you cannot say from which direction it came? A. Not definitely.

Q. This slab you say was about four feet long, did it consist entirely of bark?

A. No, sir. [51]

Q. There was a piece of timber in it?

(Testimony of Harry H. Hansen.)

A. Yes.

Q. How long had you been working up there in this same business?

A. Since I was 18 years old, the last few years I have been——

Q. ——Let me ask how old you are now?

A. I am thirty-two.

Q. During the time that you have been working there has it always been the practice for those working around the cars to move over to the north or in some direction when the logs are being rolled down to the bunker?

A. That is the way I did, yes, sir, that is in the general direction I would move.

Q. Why would you move at all?

A. Well, it was the customary place to sit down.

Q. Was there any other reason you went over there other than to sit down?

A. Yes, to get down out of the way of the unloading logs.

Q. Does bark or things fly off the logs as they roll down this hill?

A. Yes, some. I would say that on some it does.

Q. And was that one of the reasons why you moved over there so that you would not be struck by some bark or anything that might be flying off the logs?

A. Yes, sir.

Q. In your experience up there have you ever seen a slab of this [52] type; of the type that struck Mr. Powell, have you ever seen one like that fly off the logs?

(Testimony of Harry H. Hansen.)

A. I never was present at any time that a slab that large let go.

Q. From your experience up there can you tell me, first, when these logs are cut and before they are hauled to the unloading dump, are some of them splintered sometimes?

A. Yes, I would say so.

Q. And did this slab indicate that it was splintered off a log that might have been cut in the forest?

A. I never questioned that part of it. I suppose it was, it could have been an unseen splinter there with the load.

Q. Something that developed with the cutting of the logs?

A. Yes, I would say that it had occurred that way probably. I know it could happen and it would happen lots of times, that there would be splintered logs.

Q. Ordinarily that only thing that comes off those logs would be the bark?

A. Bark and very small limbs.

Q. And this was not a limb?

A. No, it wasn't.

Q. It was bark that had some timber on it?

A. Yes, sir.

Q. I think you were not too definite as to whether there were two or three logs forming this bunker on September 15?

A. That is right.

Q. It could have been just two? [53]

(Testimony of Harry H. Hansen.)

A. Yes, them logs vary in depth through there, that part of the bunker.

Q. Who put those logs in there?

A. I did.

Q. You worked for Bedal & Smith?

A. Yes, sir.

Q. What does that company do, does it haul logs for Hallack and Howard Company?

A. Yes, sir.

Q. Did you have anything to do with the cleaning out of the landing there?      A. No.

Q. Was it done by your company?

A. Yes, sir.

Q. I suppose that they have been loading logs at Banks in this same fashion for a long time?

A. Yes, sir, they have.

Q. Was there anything unusual in the way that you were performing this work at the time Mr. Powell was injured.

(I assume the objection to that question was sustained.)

The Court: Yes, it was. We will take a fifteen minute recess at this time.

September 21, 1953, 3:20 P.M.

Q. Were you performing the unloading or was it being performed [54] at the time, the same as it always has been?

A. That was my first year there. That was the only year that I worked there.

(Testimony of Harry H. Hansen.)

Q. I thought you said that you were working there before?      A. In this vicinity.

Q. When did you start to work at Banks?

A. My memory is around the 7th of May, 1949.

Q. During that time—let me ask this, the operation of the unloading of logs at the time Mr. Powell was injured was it the same operation that you had been performing since May, 1949, since you had been there?      A. Yes, sir.

Q. During the time that you were there you had observed practically every load of logs unloaded?

A. No, sir.

Q. At least you got out of the way when they were unloading logs?      A. Yes, sir.

Q. And if you had your loader down where the logs might come there would be times when your loader might be back several cars away?

A. Yes, sir.

Q. There are two tracks, the main line and immediately to the west is the loading track on which you placed cars?      A. Yes, sir.

Q. And then the road to the west again that trucks pulled in [55] on and dumped—are the tracks and the road in the same location now as they were at the time of the accident and have then been in the same location since the accident?

A. Yes, sir, I think so.

Q. Do these logs come down off the trucks with quite a force when they are dumped?

A. Yes, sir.



(Testimony of Harry H. Hansen.)

Q. And after they hit the ground they roll down on the landing to the bunker logs?

A. Yes, sir.

Q. And you testified that these bunker logs were put in there to protect cars and to protect the stuff or keep it from getting on the tracks?

A. Yes, sir.

Q. And what is done to these logs after they are unloaded, before they are loaded on the cars again, are they measured and scaled?

A. Yes, sir.

Q. Who did that scaling?

A. At the time we had two of them, Mr. Sage and his father.

Q. Who did they work for?

A. For the Howard & Halleck Lumber Company.

Q. Mr. Hansen, when did you become acquainted with Mr. Powell?

A. About the first of June.

Q. About the first of June?

A. Yes. [56]

Q. 1949?

A. Yes, sir.

Q. I take it that he never talked to you about his physical condition one way or another?

A. No, sir.

Q. You just saw him performing his work?

A. Yes, sir.

Q. Whether he might have had something wrong with him or was not entirely in good health, you wouldn't know would you?

A. Well, I seen him performing his duty and from the general appearance and in my own opinion he was in good condition.

Q. That was all you had to go by was the fact that he was performing his duties?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

(Redirect examination by Mr. Langroise.)

Q. You were asked about the people that were scaling, what do you mean by scaling?

A. Well, that is how they run those logs on. The railroad hauls them on this scaling and the company buys them.

Q. What do they do?

A. They measure the ends of the log.

Q. That is the function of measuring only, it is not the removing of bark or anything of that nature?

A. That is right.

Q. During the time you were there from May 7 to the time of [57] the accident, had anyone cleaned any of the debris from back of the bunker logs?

A. No, sir.

Q. You were asked whether or not you moved down from where the logs were being unloaded because of a possibility that the bark or anything of that kind might fly, was there any other reason?

A. Yes, our personal safety ourselves.

Q. Is that why you moved?

A. Well, it was just the general place that we came together, that is where we waited for them to unload.

Q. You were asked why you left from where you unloaded, and you gave a reason—what that the only reason?

A. No, sir, that was away from the logs.

(Testimony of Harry H. Hansen.)

Q. Those bunkers when they were filled didn't stop the logs?      A. No, sir.

(Now to page 150, the testimony of Charles Ritter.)

CHARLES RITTER

called as a witness by the defendant, after being first duly sworn testifies as follows.

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Charles Ritter.

Q. Where do you reside?

A. Banks, Idaho. [58]

Q. For whom are you employed?

A. Bedal & Smith.

Q. How long have you worked for Bedal & Smith?      A. About six years.

Mr. Elam: This is covered by the stipulation and goes to all the parties.

The Court: That is right.

Q. And during that time have you worked up there?      A. Yes, sir.

Q. And what is their business?

A. Logging contractors.

Q. Hauling logs from the forest to Banks?

A. Yes, sir.

Q. Do they conduct the unloading of the logs and the loading of the cars?      A. Yes, sir.

Q. When these logs are brought in on the trucks

(Testimony of Charles Ritter.)

where does the truck stop to dump them so that they can be loaded on the cars?

A. Anywhere along this road.

Q. That is west of the track? A. Yes, sir.

Q. How far west of the loading track is that?

A. About sixty feet.

Q. Is it on the level with the track?

A. No, it is quite a bit higher. [59]

Q. How high is the road, how much higher than the level of the tracks?

A. I would say about twenty feet.

Q. And what was your job?

A. I was a hooker.

Q. And what does a hooker do?

A. He has to guide them hooks on to the logs to be loaded.

Q. Puts them into position?

A. Hook the end of the logs, there were two of us, one at each end.

Q. Is that for the purpose of loading the derrick—picking them up—the logs?

A. Yes, sir.

Q. You worked for six years, and I believe you were in the service a couple of years—did that include two years in the service?

A. I wasn't counting that, about eight years with that.

Q. How long had you worked for Bedal & Smith prior to the 15th of September, 1949?

A. Well, maybe—the first I believe was four years.

(Testimony of Charles Ritter.)

Q. Was the work continuous there at that time, this last time you were up there to 1949, to September, 1949? A. In the summer time.

Q. Is there a portion of the year that there is no logging operation? A. Yes, sir. [60]

Q. What portion of the year is that?

A. That is in the winter months.

Q. When did they start in the spring?

A. About the first of May.

Q. And about when did they end that work in the fall? A. About the first of December.

Q. Do you recall the accident that occurred up there on September 15, 1949?

A. Yes, sir, I do.

Q. At the time this accident occurred where were you with reference to the tracks?

A. I was west of the track.

Q. Were you on the log bunker or where?

A. I was standing beside him.

Q. Standing beside Mr. Powell?

A. Yes, sir.

Q. Was he north or south of you?

A. He was south of me.

Q. What were those bunkers that you mentioned?

A. They were the largest logs that we could find to put in there.

Q. How many were there where you were standing before the logs came down, do you know?

A. No, I don't.

(Testimony of Charles Ritter.)

Q. You, of course, saw the logs unloaded from the trucks and rolling toward the tracks?

A. Yes, sir.

Q. Where they came down toward the track, what was the condition [61] of the bunker or the landing just west of the bunker where the logs came down?

A. It was pretty well filled up.

Q. Was it filled to the top of the bunker?

A. Except for a dip where we drug the logs.

Q. How large was that dip?

A. Well, maybe a foot or a foot and a half ditch there.

Q. And how wide was that place?

A. About 20 feet.

Q. About 20 feet wide? A. Yes, sir.

Q. Where was the bottom of the slope of the hill west of the track, how far?

A. That would be about 20 feet.

Q. Then, what was the nature of the slope from this 20 feet west of the track—that is, after this 20 foot space west of the track what was the nature of the slope up toward the truck, was it on an incline?

A. Yes, sir, it was pretty steep.

Q. Who put the logs there—that is, the bunkers, who put them up there?

A. We assisted.

Q. You mean Bedal & Smith?

A. Yes, sir.

Q. When you started out with your logging operation in the spring, what was the nature, did you have one or two or [62] how many logs.

A. We put them all in clear through.

(Testimony of Charles Ritter.)

Q. And then you added logs as you wanted any?

A. Yes, sir, unless they were left there from the year before.

Q. This landing west of the logs that extended west, you say that extended out about 20 feet?

A. Yes, sir, about that.

Q. And that did they consist of?

A. Bark and trash in there.

Q. Was it solid or soft material?

A. It was soft.

Q. And about how far west were you of the place where the logs came down off the hill to the track?      A. West.

Q. No, I meant to say how far north?

A. I was about 60 feet north.

Q. Did you see—first, let me ask you, how are those logs unloaded from the trucks on the road?

A. We have a Cat with a boom on the front and they drive under and have a line that goes underneath and that is all run by a power unit.

Q. Are the logs all pushed off at once?

A. No.

Q. They are pushed off in series?

A. Yes, sir, in series.

Q. How many are—how many would be pushed off at first?

A. I would say four or five of them would fall off. [63]

Q. When did you make the next push?

A. As soon as the chains were cleared.

(Testimony of Charles Ritter.)

Q. How many pushes do you have to make to unload a load of logs?

A. That varies, but about three.

Q. At the time in question—let me ask you this—why were you over about 60 feet to the north of where there logs were coming down?

A. To be out of the way of them.

Q. Why did you go over that far?

A. We always did, I don't know why.

Q. Was it because—what happens when these logs are unloaded, do pieces fly off the logs?

A. Small pieces, yes, sir.

Q. Now, on this particular load of logs, did you see them pushed off the truck?

A. Yes, I did.

Q. Did you see them hit the ground?

A. Yes, sir.

Q. How far from the truck did they hit the ground would you say?

A. You mean down over the hill?

Q. Yes.

A. I would say about ten feet, that is, the top of the logs.

Q. How far would they drop down to the ground from where they would be on the truck?

A. Oh, that would be about twelve feet. [64]

Q. When this accident occurred was it when the first logs were being dumped?

A. I don't remember whether it was or not.

Q. Then after these logs were dumped immedi-



(Testimony of Charles Ritter.)

ately preceding this accident, what did you see, if anything, that took place there?

A. I saw the slab coming through the air.

Q. Did you see where it broke off, where the logs were, that this slab broke off of?

A. About one-half way down the hill I would say.

Q. When you saw this slab flying through the air did you holler or start to run?

A. I guess I hollered and started away.

Q. Had it struck Mr. Powell?

A. No, but it did.

Q. Did you see it strike him?

A. No, I didn't.

Q. Did you see him afterward?

A. Yes, sir.

Q. Where was he?

A. I saw him when he crawled under the car to come out on the other side.

Q. Did you pay any particular attention to this slab?

A. Yes, sir, I did.

Q. What did it consist of? [65]

A. Mostly wood. It was a pretty big slab, four or five feet long and it weighed about 80 pounds.

Q. Were the operations at that time being handled and conducted, that is, the unloading of the logs and other operations there, were they any different than the work that had been performed before?

(There was an objection which was sustained.)

(Testimony of Charles Ritter.)

Q. How did you handle the logs, how did you unload them—in what manner did you unload the logs prior to the day and the time that this carload or truck load was dumped?

A. The same way.

Q. At the time this slab broke off the log had it reached the landing or the bunker?

A. No, sir.

Q. Do you know what caused the slab to break off?      A. Not unless——

Q. Had you ever before seen a slab break off such as this?      A. No, sir, not like this.

Q. Then from your experience in this operation up there do you have an opinion as to what caused this piece to break off this log?      A. No.

Q. Do you know whether or not in cutting the log in the forest, or cutting and trimming them after they had fallen, are they sometimes splintered?

A. I believe they are sometimes splintered. I think they [66] could have been in falling or in skidding.

Q. Prior to this time what had you seen break off these logs as they were dumped?

A. I would say bark and small limbs.

Q. And would that stuff, the bark and limbs fly through the air?

A. Yes, but usually down hill with the logs.

Q. Would it fly off to the side?

A. Unusually.

(Testimony of Charles Ritter.)

(The following is cross-examination by Mr. Langroise.)

Q. Mr. Ritter, you examined this bunker and the fill back of it after the accident?

A. Yes, sir.

Q. At the point the debris and other stuff was level with the top log of the bunker?

A. Yes, sir.

Q. And the depression that you spoke of is back behind that some distance?      A. Yes, sir.

Q. And sloped back to the top?

A. Yes, sir.

Q. That place where they unloaded was on the road and you say that it has an elevation of about 20 feet higher than the bunker?

A. Than the railroad track, down to the railroad level. [67]

Q. About 20 feet higher than the railroad track—how much higher from the bottom of this fill behind the bunker was the elevation to where the logs were unloaded?

A. About 50 feet, I imagine.

Q. Fifty feet back west of the bottom of the fill behind the bunker logs?      A. Yes, sir.

Q. What was the elevation of this, fifty feet back.      A. I would say about fourteen feet.

Q. From there on the perpendicular raise of 14 feet more, is that what you mean?      A. Yes.

Q. And in that 50 feet there was a drop of fourteen feet from the road itself?

(Testimony of Charles Ritter.)

A. About that.

Q. Where was the edge of the road from which they unloaded logs with respect to this drop—to where the drop started?

A. Well, they were on the edge of the road.

Q. When they dropped they hit on down and took this 50 feet with the fourteen foot drop and out they went from the road?

A. That is right.

Q. This fill behind the bunker logs had been full for sometime before the injury to Mr. Powell?

A. That is right. [68]

Q. For some time prior thereto there had been, as the logs were unloaded, there were occasions that they were going over and hitting the cars?

A. At times.

Q. That was not uncommon for several weeks before the accident?

A. That is right.

Q. You say that when they were unloading at different times limbs and other pieces of the logs and bark would fly off but they always went down?

A. Usually they went straight down.

Q. But sometimes they went out at different angles?

A. Yes, sir, at times.

Q. Do you recall about how many logs was on this load?

A. Probably fifteen anyway.

Q. It would depend entirely upon the size?

A. Yes, sir.

Q. Did you see these logs as they went down the hill, all of them?

(Testimony of Charles Ritter.)

A. This part that the slab came off.

Q. Did you see them going over the bunker?  
That is, did you see them go over the bunker and hit the train?

A. I don't know whether they went over or not.

Q. You said that you were standing there?

A. Yes, sir.

Q. You know Mr. Hansen, do you?

A. Yes, sir. [69]

Q. Did you see Mr. Hansen there?

A. Yes, sir.

Q. Where was he with respect to you?

A. I think he was the second man to my right.

Q. Being the second to the right, would that be the second to the north?      A. Yes, sir.

Q. Was there someone between you and Mr. Hansen?      A. Yes, Mr. Parrish.

Q. Did you see the position of Mr. Hansen?

A. I didn't pay any attention.

Q. Did you notice the position of the other man?

A. No, not particularly.

Q. You were all together there?

A. Yes, sir.

Q. You saw this slab of wood, where was this when you first saw it?

A. About half way down the bank.

Q. It had gone about half way down this 50-foot incline. Then what did you see it do?

A. I saw it break off and fly through the air.

Q. At the moment you saw it what did you do?

A. I hollered.

(Testimony of Charles Ritter.)

Q. You looked around and what did you see?

A. Mr. Powell was gone. [70]

Q. He had been there—he wasn't there any more?

A. No, I didn't see it hit him.

Q. This piece weighed 75 or 80 pounds?

A. Yes, sir.

Q. It was mostly wood? A. Mostly wood.

Q. Had you, prior to the 15th of September, 1949, complained to the Agent of the Union Pacific of this being filled up behind the bunkers and being dangerous?

A. I hadn't, no.

Q. And had you not complained to anyone?

A. No.

Q. Going back to this load of logs on the truck, you saw it unloaded?

A. Yes, sir.

Q. Did all the logs come off at once?

A. No, sir.

Q. What did you observe?

A. About half a dozen logs.

Q. You saw them go on down?

A. Yes, sir.

Q. And did you see some more come?

A. Not after that slab flew—I didn't see any more.

Q. It was the first bunch that you observed that you saw this slab come from?

A. I would say that it was but I am not [71] sure.

Q. You would not say whether there were some logs that went down ahead of that?

A. No, I am not sure.

(Testimony of Charles Ritter.)

Q. When they rolled or came off the truck what would they do?      A. They would roll.

Q. Around and around?

A. Yes, that is right.

Q. You don't recall whether there were logs ahead of this that you saw the piece come from?

A. I don't remember whether it was the first or not, it could have been the second.

Q. What time would there have been between the first and the second, if you know?

A. Well, a minute, maybe.

Q. Those logs go down there rapidly?

A. That is right.

Q. That is, when they are dumped?

A. That's right.

Q. And all of whatever bunch was dumped off went down together?      A. That is right.

(Now, the redirect by Mr. Anderson.)

Q. Was there more than one slab that flew off the logs and struck Mr. Powell?

A. Just one.

Q. And that is the one that you testified to?

A. Yes, sir. [72]

(Recross by Mr. Langroise.)

Q. You didn't see that?

A. No, sir, I didn't.

Q. And you don't know the position he was in when he was hit?      A. No, sir.

(Now we come to the testimony of Albert Parrish.)

## ALBERT PARRISH

called as a witness by the defendant, after being first duly sworn testifies as follows:

## Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Albert Parrish.

Q. Where do you live?           A. At Banks.

Q. By whom are you employed?

A. At the present time by the Caldwell Box Company.

Q. And who were you working for on September 15, 1949?           A. Bedal & Smith.

Q. What was your job?

A. A hooker on the log landing.

Q. A hooker on the log landing?

A. Yes, sir.

Q. You had the same duties that Mr. Ritter had?

A. Yes, sir, we worked together.

Q. He worked on one end of the logs and you on the other? [73]           A. That is right.

Q. Did you see the accident to Mr. Powell on September 15, 1949?

A. I saw the logs being unloaded and I saw the slab but I never saw Mr. Powell struck by the slab.

Q. Did you see the slab flying through the air, that struck Mr. Powell?           A. Yes, sir.

Q. Where were the logs—let me ask this—did you see this piece break off the logs or log?



(Testimony of Albert Parrish.)

A. No, sir, I didn't. I just saw it in the air and someone hollered.

Q. Did you know which direction it came from?

A. From the west of where we were at.

Q. Do you know about how far the slab was from the log that it broke off from when you first saw it?

A. Now, I couldn't say. It didn't know which log it broke off of at that time.

Q. Did you watch the logs roll down the hill off the truck?

A. Yes, sir, we always watched them.

Q. And did you see the slab?

A. Yes, I saw the slab in the air.

Q. How close was it to the logs that were rolling down the hill?

A. Well, I couldn't say exactly, probably 10 or 12 feet from the logs when I saw it.

Q. When you saw this piece of slab flying through the air had the logs gotten down to the bunker yet? [74]

A. Not all of them.

Q. How long had you been working at Banks in that occupation or capacity?

A. I started in July. I don't know the exact date but it was in the month of July. I started to work that summer.

Q. Had you watched the numerous trucks of logs unloaded there? A. Yes, sir.

Q. Where were you at the time this slab broke off the log?

(Testimony of Albert Parrish.)

A. At the time it broke off I was probably 55 or 60 feet from where the logs were coming down.

Q. To the north?

A. And then I ran 25 or 30 feet on to the north and when I saw the slab I was probably 80 feet away when the slab struck.

Q. Were you further away than Mr. Ritter and Mr. Powell?      A. Yes, when I stopped I was.

Q. What did you do when you saw this slab coming through the air?

A. I tried to get out of the way.

Q. During the time that you were operating there have you seen slabs of this type break off and go through the air such as this?      A. No, sir.

(The cross-examination by Mr. Langroise.)

Q. Where was that slab when you first noticed it?      A. It was in the air.

Q. It was coming in what direction? [75]

A. It was—well, the logs were being unloaded to the west of the tracks and it was flying to the west (should be east).

Q. How far away from where you were?

A. At the time it was about 60 feet from where I was at that time.

Q. Did you see anyone when you saw the slab?

A. No, someone shouted a warning but I don't know who it was. Someone hollered "look out."

Q. You had been watching them unload logs before?      A. Yes, sir.

(Testimony of Albert Parrish.)

Q. And was this off some of those logs that dropped off first or how were they?

A. I cannot say whether it was first or not.

Q. Do you know whether the logs had run over the bunker or hit the cars before this?

A. I don't think so.

Q. Do you know?

A. No, I cannot state for sure.

Q. It was not unusual for logs to go over the bunker and hit the cars?

A. Now and then one would go over.

Q. While you were there other material and pieces of logs did come off and fly through the air?

A. Yes, sir, some pieces.

Q. This bunker that you were on, how close was it to the railroad cars themselves?

A. About four feet from the cars. [76]

Q. From the cars themselves?

A. Yes, about three or four feet.

Q. And in some places not more than a foot?

A. They have more clearance than that, they usually set them out about four feet from the cars.

Q. You think it was about four feet?

A. Yes, sir.

Q. That is your judgment? A. Yes, sir.

Q. You didn't see this wood hit Mr. Powell?

A. No, sir.

Q. When did you see him after that?

A. When he was crawling under the car.

(Now the testimony of Mr. Sage.)

The Court: I think we will stop there. I should have said to the jury at the beginning of this reading that this is saving a great deal of time. It may sound somewhat tedious to the jury but I want to tell you that these witnesses have testified heretofore in this Court room and they are using this as depositions to give you the benefit of their testimony the same as if the witness were here on the stand testifying and you should so consider it. Court will be in recess until 10 o'clock tomorrow morning. [77]

September 22, 1953, 10 A.M.

The Court: You may proceed Mr. Anderson.

#### HOWARD SAGE

called as a witness by the Defendant, after being first duly sworn testifies as follows:

#### Direct Examination

By Mr. Anderson:

Q. Your name is Howard Sage?

A. Yes, sir.

Q. Where do you reside?           A. At Banks.

Q. By whom are you employed?

A. Hallack & Howard Lumber Company.

Q. How long have you been employed by them?

A. Since 1944.

Q. During any of that time has any of your work been at Banks?           A. Yes, sir, since 1945.

Q. And what are your duties?

(Testimony of Howard Sage.)

A. To scale these logs and determine the amount of boards that can be sawed out of them.

Q. When is this scaling done?

A. After they are unloaded from the trucks and before they are loaded on the cars.

Q. Do you recall an accident to Mr. Powell on September 15, 1949?           A. Yes, sir.

Q. Where were you just prior to the time of that accident? [78]

A. I was fairly close to Mr. Powell in a group of fellows standing there.

Q. How far was that from the place that the logs would roll down the hill to the bunker?

A. I would judge about 60 feet.

Q. Why were you in that position?

A. Well, for two reasons. One was to get out of the cloud of dust that always goes up when they are dumped, and the other was to get out of the way of the logs and to be in a safe place if one decided to take a different direction.

Q. Did anything fly off those logs as they came down?           A. Occasionally a piece of bark.

Q. How far is this road that the trucks come in and dumped those logs from the loading tracks?

A. I think it would be 40 or 50 feet in a horizontal distance.

Q. Would the logs be higher than the level of the tracks?           A. In this case it was, yes, sir.

Q. How much higher would it be to the wheels of the truck up on the road than the level of the tracks?

(Testimony of Howard Sage.)

A. I would say it would be 20 to 25 feet.

Q. And these logs are dumped off the truck to the west and then they roll down an incline, is that right?

A. Yes, sir.

Q. And of course, there is a log bunker west of the tracks?

A. Yes, sir. [79]

Q. Is there a landing west of the log bunker?

A. Yes, sir, there is a place that is fairly level west of it.

Q. How wide is that level place west of the bunker?

A. About 20 or maybe 18 feet.

Q. And then over there west, what is the condition of the ground is it level or otherwise?

A. It is not level, it raises at about a 45 degree angle I would say.

Q. What is on this landing?

A. Well, after loads of logs are dumped there is an accumulation of bark.

Q. Did you see this slab that struck Mr. Powell?

A. Yes, sir.

Q. Did you see it break off the log?

A. I didn't see it break off the log.

Q. Can you tell us the direction—first, did you see it coming through the air?

A. I saw it in the air.

Q. From which direction was it coming toward you?

A. From the west and the south.

Q. Did you see it strike Mr. Powell?

A. Yes, sir.

Q. What did you do when you saw it coming?

(Testimony of Howard Sage.)

A. Well, I don't distinctly remember, but I imagine that I shouted and backed off a few paces.

Q. Did you see Mr. Powell afterward?

A. Yes, sir. [80]

Q. Where was he when you saw him after the accident?

A. He was crawling from under the car on the other side.

Q. From the angle that the slab came through the air could you tell me whether or not the log from which it came had reached the bunker yet?

A. No, I couldn't tell you that.

Q. The tracks there run almost directly north and south, is that right?      A. That is right.

Q. And this slab would be coming from the south and the west, is that right?      A. Yes, sir.

Q. I presume that you had watched this kind of unloading for a long time up there?

A. Hundreds of times, yes, sir.

Q. Had anything of this particular nature ever occurred before?

A. I have never noticed anything like this, no, sir.

Q. Had you seen anything fly off those logs before?

A. Yes, pieces of bark would be about all.

Q. I don't know, maybe I asked this, did I ask you whether you were about 60 feet north of the place where the logs came down?

A. Yes, you asked that.

Q. Do you know about how far those logs were

(Testimony of Howard Sage.)

down the hill after they had been dumped when you saw this slab coming [81] through the air?

A. About half way I would say.

Q. Then tell me about how far those logs would fall when they are pushed off the truck before they hit the ground?

A. Well, they were not all the same distance. The top would fall farther, the truck load of logs would be about 12 or 13 feet above the ground.

Q. I suppose those logs were different sizes?

A. Yes, sir.

Q. Do you have any idea of the average weight of one of them?

A. The railroad company requires us to bill them at 9 pounds to the board foot.

Q. Ordinarily how many board feet in one of those?

A. Well, that would vary up to a thousand board feet.

Q. On an average?

A. I imagine about 200 feet—200 board feet.

(Cross-examination by Mr. Langroise.)

Q. Mr. Sage, as these logs came down did you notice in this load how many had come down before Mr. Powell was hit?      A. No, sir, I did not.

Q. Do you know whether some of them had hit the loaded cars?

A. No, I didn't—I don't know.

Q. You don't know whether they had or not?



(Testimony of Howard Sage.)

A. No, sir.

Q. Do you know whether some had gone down and over the bunker [82] prior to those that you noticed coming down when you saw this piece?

A. They could have, but I don't remember whether they did or not.

Q. You saw it hit Mr. Powell?

A. Yes, sir.

Q. What did you notice it do to Mr. Powell?

A. Well, Mr. Powell threw his arm up to protect his face and it knocked him from this log backwards, that is as far as I could see because I was one the opposite side of the log.

Q. What was the condition of this bunker behind—that is, whether it was filled?

A. Well, there was bark behind this, that is why the logs were there, to hold the bark back behind there.

Q. And did it fill up to the top?

A. It was fairly level with the top.

Q. And it had been full for some two weeks or thereabouts before this accident?

A. Well, I wouldn't know exactly the time, but it was some few days.

Q. The logs had been going over the bunker and hitting the cars?

A. That happened quite often.

(Redirect examination by Mr. Langroise—  
pardon me, that was my redirect.)

Q. Do you know whether or not the bunker was

(Testimony of Howard Sage.)

full, that is, whether it was full or not full, did some of the logs go [83] over anyhow?

A. Well, they could on account of when they get on top of the others, they sometimes get to going end-ways.

Q. Did you have control of those logs after they are dumped off the trucks?

A. No control whatever.

Q. When they are dumped they are on their own?

A. That is right.

Mr. Anderson: Plaintiff rests, your Honor.

Mr. Eberle: We rest as to the Plaintiff.

Mr. Anderson: I will be glad to make a motion at this time.

The Court: I take it the matter is submitted as to the case of the Plaintiff Union Pacific Railroad Company and Hallack & Howard Lumber Company?

Mr. Anderson: That is my understanding.

The Court: The case having heretofore been tried so far as the Plaintiff in that case, Mr. Powell, and the Union Pacific Railroad Company is concerned, and the jury in this case having found negligence on the part of the Railroad Company in not furnishing a safe place for Mr. Powell to work in connection with the unloading of these logs, they held that was negligence. There being an indemnifying agreement here from Hallack & Howard Lumber Company to hold the railroad Company harmless, there is only one thing that the Court can do and that is [84] to find that the Union

Pacific Railroad Company is entitled to recover from the Hallack & Howard Lumber Company under the indemnifying contract and on account of the negligence found to have existed on the premises. The Railroad Company may present their findings and judgment in connection with that.

I will take a recess at this time for fifteen minutes and will talk with counsel about further proceedings.

September 22, 1953, 10:35 A.M.

Mr. Eberle: I understand that exhibit 2 was admitted for all purposes as to all parties, I think I am not in error as to that?

The Court: That is right, there were no restrictions as to that.

Mr. Eberle: I now offer exhibit 7 for the purpose of showing the scope of that which was adjudicated in the Powell case.

Mr. Elam: We have already stated what we would stipulate—

The Court: —you are in another case now—we are trying the case of Hallack & Howard Lumber Company vs. Bedal, we are trying this before this jury.

Mr. Elam: We stipulated what could be read.

Mr. Eberle: I am not reading anything now, I am offering it to show the scope of that which was adjudicated and determined in this case. [85]

The Court: You are putting the transcript in for that purpose alone?

Mr. Eberle: Yes, your Honor.

Mr. Elam: We object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: It may be admitted for that purpose only.

Mr. Eberle: There is one more matter before I call Mr. Armstrong. May it be stipulated that if L. H. Anderson was sworn as a witness and in lieu of his testifying, that he would testify that in the Powell case, he at that time was counsel for the defendant and that he had charge of the litigation and that if either Bedal or his insurance carrier or anyone else on his behalf had offered to take over the defense or to assist in the same that Mr. Anderson and his client would have accepted such defense or assistance.

Mr. Elam: And also that neither Mr. Anderson nor the Railroad Company at any time called on Mr. Bedal to defend that case.

Mr. Eberle: You mean that they did not.

Mr. Elam: They did not.

The Court: It may be so stipulated.

#### U. R. ARMSTRONG

called as a witness for Hallack & Howard, in the case of Hallack & Howard v. Bedal, after being first duly sworn testifies as follows: [86]

#### Direct Examination

By Mr. Eberle:

Q. Mr. Armstrong, where do you reside?

A. Winchester, Idaho.

(Testimony of U. R. Armstrong.)

Q. Are you now employed by the Hallack & Howard Lumber Company?      A. Yes, sir.

Q. In what capacity?

A. General Manager.

Q. And how long have you been so employed?

A. Thirty-nine years.

Q. During the year 1949 did you have charge of the Hallack & Howard Company operations at Cascade, Idaho?      A. Yes, sir.

Q. Was it your Company that entered into a logging contract with Bedal and Smith?

A. Yes sir.

Q. Mr. Armstrong, handing you exhibit 8 marked for identification, I will ask you what that is?

A. This is a logging contract that Hallack & Howard Company had with Mr. Bedal.

Mr. Eberle: If the Court please, there is a copy in the pleadings but I would also like to offer the original.

Mr. Elam: No objection.

The Court: It may be admitted.

Mr. Eberle: There are two clauses here that I would like to read to the jury. [87]

The Court: You may do so.

Mr. Eberle: "It is further stipulated and agreed that under no circumstances is the party of the first part", (that is Hallack Howard Lumber Company) "to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract" and then again,

(Testimony of U. R. Armstrong.)

“Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liabilities and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract.”

Q. Mr. Armstrong, it has been developed in the case known as Powell vs. Union Pacific Railroad Company that there were certain bunkers and log landing at Banks, Idaho, do you know who put those in?

A. The logging contractor, Mr. Bedal.

Q. Did you have anything to do with the installation of those log bunkers?

A. No, we didn't.

Q. In exhibit 8 there is reference to a Banks landing, you are familiar with those premises?

A. Yes, I am.

Q. Are you also familiar with the premises under lease at that time from the Union Pacific Railroad Company? [88-89]

A. Yes, I am.

Q. Are these properties identical?

A. I don't understand your question.

Q. With reference to the Banks Log Landing and the leased premises?

A. Oh, yes, they are.

Q. In 1949 and in the carrying out of this logging contract that you have just testified to did Hallack & Howard Lumber Company have anything to do with

(Testimony of U. R. Armstrong.)

the loading or unloading of logs at the banks landing?      A. No, sir.

Q. Who had the function of loading and unloading?

A. Our contractor Mr. Bedal.

Q. What employees, if any, did you have at Banks, Idaho, or at the Banks Landing in September, 1949?

A. As I recall we only had two employees there, scalers, log scalers.

Q. Did they have any function to perform other than scaling the logs?      A. No, sir.

Q. Who cut the logs in the forest?

A. Our contractor, Mr. Bedal.

Q. You mean the defendant here, Bedal?

A. Yes, sir.

Q. Who loaded those logs on the trucks and brought them to the log landing at Banks, Idaho? [90]

A. Our contractor Mr. Bedal.

Q. Did Hallack & Howard Lumber Company take any part in the loading or the unloading of the logs at the Banks landing in 1949, in September 1949?      A. No, sir.

Q. Did you employ any of the men working there?      A. No, sir.

Q. Did you have anything to do with the employees of the logging contractor, the third party defendant, Bedal?      A. No, sir.

Q. Did the Hallack & Howard Lumber Company have anything to do with the logging operation at

(Testimony of U. R. Armstrong.)

Banks in September 1949? A. No, sir.

Mr. Eberle: You may inquire.

Cross-Examination

By Mr. Elam:

Q. This Banks landing that you referred to that consisted of this roadway along on top of this elevation? A. Yes, sir.

Q. And the hill to roll down and the bunker?

A. Yes, sir.

Q. That road was there at the time you entered into this contract? A. Yes, sir.

Q. And was there as a part of what is called the landing? A. Yes, sir.

Q. And that road was for the purpose driving trucks up and [91] unloading at the top of the grade? A. Yes, sir.

Q. That had been there for a long time before this contract was entered into?

A. Yes, sir.

Q. And had been used for that same purpose?

Mr. Eberle: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination, and it is not within the issues.

The Court: It is immaterial for two reasons,—it doesn't make any difference how long it had been used, the entire question is, was the use of it negligent. It is not proper cross-examination. Objection sustained.



(Testimony of U. R. Armstrong.)

Q. And there was no other road there from which to unload these logs?

Mr. Eberle: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained, there is no other landing in question except where these logs were unloaded.

Q. Now, as to your employees, you say that you had two scaling employees? A. Yes, sir.

Q. They worked there at the landing?

A. Yes.

Q. The manner of unloading the logs you heard described here? A. Yes sir. [92]

Q. Is that the customary and the ordinary way for unloading the logs?

The Court: Mr. Elam, I have ruled on that question several times. It doesn't make any difference what the customary way of unloading the logs was, it is a question of whether it was negligent to unload them as they did.

Q. You were not there at the time the accident happened? A. No.

Mr. Elam. That's all.

Mr. Eberle: That's all. We rest your Honor.

The Court: I take it that it is understood that all of the evidence introduced in the trial of the case of Union Pacific Railroad Company vs. Hallack & Howard Lumber Company was introduced in your behalf as against the defendant Bedal.

Mr. Elam: No, your Honor, the Powell evidence was not introduced as against this defendant.

The Court: No, not the Powell evidence but the other witnesses, and that evidence is before the jury and does not need to be repeated.

Mr. Elam: That is correct.

The Court: The jury may retire a few minutes. Now, Mr. Elam do you desire to make a motion.

(In the absence of the jury.)

Mr. Elam: Comes now the third party defendant at the close of the evidence introduced by the third party [93] Plaintiff and as to each count of the third party complaint moves the Court to dismiss the third party Plaintiff's action and to direct the jury to return a verdict in favor of the third party defendant upon the following grounds and for the following reasons:

1. That the Third Party Plaintiff's evidence is wholly insufficient to warrant a recovery by it upon the facts and upon the facts and the law the third party Plaintiff has shown no right to relief.

2. That there is no evidence whatsoever to establish negligence on the part of the Third Party Defendant; that the evidence proves the following facts:

- (a) That the logs were delivered in the regular manner at the place designated by the Third Party Plaintiff.

- (b) That the logs were unloaded in the regular and accustomed manner.

(c) That the men below, including Powell, knew that logs were being unloaded at the time of the alleged accident.

(d) That the men below know that they must watch to avoid the logs and the debris flying from the logs.

(e) That it was not unusual for logs to split and pieces to come off.

(f) That the logs in falling, spinning and whirling would throw pieces therefrom.

(g) That the evidence shows that the splinter or slab came off the log while it was half way up the incline and before it reached the bunker or the level place or space just west of the bunker.

(h) That this was an unavoidable accident.

(i) That there is no evidence whatsoever to show that the unloading of the logs was other than used in the unloading of other logs and there is no evidence to show that the unloading itself was of any negligent nature.

(j) That the evidence shows that if there was any negligence on the part of Bedal, there was contributory negligence on the part of Powell which contributed to and was the proximate cause of the accident.

(k) That the evidence introduced herein proves that the obligation of Hallack & Howard was under a specific indemnity agreement as provided in their lease, that there is no such indemnity agreement as

between Hallack & Howard and the third party defendant.

3. That the contract between third party plaintiff and third party defendant is a written contract, which according to its terms is not a contract of indemnity, that the interpretation of this contract is a matter of law and that this contract does not impose on the third party defendant any agreement or contract for indemnity or guaranty in connection with the facts and the pleadings herein. [95]

The Court: I am going to overrule the motion but in overruling the motion I want it understood that I am not finally passing on the one question as to whether this is an indemnifying contract or not. I have heretofore ruled that it wasn't an indemnifying contract, without prejudice and I am still holding that matter open.

(The following in the presence of the jury.)

The Court: You are excused until 2 this afternoon, and we will recess at this time until 2 p.m.

September 22, 1953

Mr. Elam: Under the agreement between the attorneys under which the testimony of Mr. Hansen, Mr. Ritter, Mr. Parish and Mr. Sage was offered and read into the record, we are taking that as our evidence now, and we have no further evidence to introduce. We rest.

The Court: The jury may retire and you may be excused until 10 o'clock tomorrow morning.

(The following in the absence of the jury.)

Mr. Eberle: Comes now the defendant and third party Plaintiff Hallack & Howard Lumber Company, at the close of the evidence, all parties having rested, and moves the Court for judgment in its favor and against W. O. Bedal in the amount of the judgment entered or to be entered in favor of the Union Pacific Railroad [96] Company and the Oregon Short Line Railroad Company, and to direct the jury to return a verdict in such amount in favor of Hallack & Howard Lumber Company and against the said W. O. Bedal, for the following reasons:

1. The negligence of Bedal was the sole, primary, active, efficient and proximate cause of the injury and damage to Powell resulting in the judgment against the railroad company and in turn against Hallack & Howard Lumber Company.

2. That such negligence and the tort involved was committed solely by Bedal and was adjudicated in the Powell action and the judgment against the railroad company as well as the judgment against Hallack & Howard Lumber Company here could not exist without such determination, hence, as a matter of law in this case, such judgment necessarily determined that the act of negligence of Bedal was such sole, active, primary and proximate cause of the damage that resulted. Bedal had notice of the Powell case and an opportunity to defend and so likewise in the current case and so is bound by the orders, instructions and judgment in the Powell case.

This Court, in the Powell case, held that whether the operation of Bedal in allowing logs to be sent down the steep incline was negligence was a question for the jury, and the verdict pursuant thereto is conclusive as to Bedal's negligence. It is not of consequence that Powell did not sue Bedal in the first instance, nor that [97] Bedal could have tendered defenses not available to either the railroad company or Hallack & Howard Lumber Company because Bedal, by reason of his negligence, was not only liable to the person directly injured as a result of such negligence but also accountable to Hallack & Howard Lumber Company which has been compelled or will be compelled to respond in damage for such wrong. The record is clear, only one tort is involved and that the same was committed solely by Bedal as an independent contractor and the judgment in the Powell case necessarily adjudicated such negligence and the amount of the damage sustained, and any judgment rendered against Hallack & Howard Lumber Company must necessarily be recovered from Bedal as such tort-feasor. The defenses set forth in the answer of the third party defendant which Bedal contends could have been set up had he been sued directly is immaterial in this case because the right of Hallack & Howard Lumber Company to recover from Bedal here is a different and independent right resting upon the principle that everyone is responsible for the consequences of his own wrong and if another has been compelled to pay such damage which the wrongdoer should have paid, the latter is liable to the former. As a matter of law Powell was not guilty of contrib-

utory negligence, there were no contractual relation between Powell or Bedal, nor was there the relationship of Master and Servant. There is no evidence that the danger imminent that no reasonably prudent person would have been where he was at the time of the accident. Bedal cannot raise in this action any question as to the negligence of Powell, which as a matter of law was settled in the Powell case. Bedal cannot deny here the facts upon which the judgment in the Powell case depends and without which it could not have existed. There could be no defense made here that there may have been a different rule as to the railroad company in the Powell case which might not have been applicable to Bedal had he been defending, because Hallack & Howard Lumber Company assert here a right of recovery on an independent duty and only owed by Bedal to Hallack & Howard Lumber Company and to deprive Hallack & Howard Lumber Company the right to recover against the wrongdoer would result in the unjust enrichment of the debtor and how or in what manner Hallack & Howard Lumber Company may be compelled to pay for the wrong of Bedal is immaterial here because the only question is, was it compelled to pay on account of a tort committed by Bedal.

The Court: I would like to hear from you on this motion providing you have any authorities.

(Remarks of Court and Counsel reported but not transcribed.)

The Court. I am inclined to grant this motion, however, I will take it under advisement until ten o'clock tomorrow morning. [99]

September 23, 1953—10 A. M.

The Court: I will review for a moment the steps leading up to the decision I am about to make.

On October 13, 1950, one A. M. Powell as Plaintiff filed suit against the Union Pacific Railroad Company under an Act of Congress, which among other things provided that Railroad Companies were required to furnish their employees with a safe place to work. In that action it was alleged that the Plaintiff in that action, Powell was employed by the Union Pacific Railroad Company near Banks, Idaho, at which place there was a loading bunker for the purpose of loading logs on defendant Union Pacific's railroad cars. While he was employed at that place, logs were being rolled down an incline in a hazardous and dangerous manner which the Union Pacific knew or in the exercise of reasonable care could and should have known, and this was a violation of the Statute which required the Railroad Company to furnish the said Powell with a safe place in which to work. The case was tried before a jury and the jury held that the manner of handling the logs was negligent and returned a verdict against the Union Pacific for \$15,000.00. Judgment was entered on this verdict on March 2, 1951, in which it was ordered, adjudged and decreed that Powell recover from the Union



Pacific the sum of \$15,000.00 with interest at the rate of six per cent per annum, and costs. [100]

Motion was made by the Union Pacific for judgment notwithstanding the verdict—this was denied by this Court. The Court finding that according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were being loaded on the train. A Cat and Boom were used and a line placed under the logs and they were pushed off the truck and down a steep incline, a distance of some twenty or more feet, the incline was so steep that they fell through the air for a distance of some twelve feet before they hit the ground and then rolled on the balance of the distance to the bunker. The slab that caused the injury to Powell broke off one of these logs and was thrown through the air and no doubt was caused to break from the log because of the force of the drop.

The operation of driving these trucks to the top of this steep embankment and the pushing of the logs off the truck and allowing them to descend this steep incline to the track was negligence—this was a question for the jury and on that ground the Court denied the motion. An appeal was later taken, which however, was dismissed after a compromise settlement. The Union Pacific made payment to Powell of \$14,500.00 on December 15, 1951. At the time this accident occurred the land upon which it occurred belonged to the Union Pacific Railroad Company [101] and was leased to the

Plaintiff in this action, the Hallack & Howard Lumber Company. Under this lease, the Hallack & Howard Lumber Company agreed to hold harmless the Union Pacific Railroad Company and the leased premises from any and all liens, fines, damages, penalties, forfeitures and judgments in any manner accruing by reason of the use or occupancy of the premises by the lessee. This lease and agreement was in full force and effect at the time and place of the injury of said A. M. Powell. The injury to said Powell was caused by the use and occupation of the leased premises and the unloading of the logs thereon by the Hallack & Howard Lumber Company who had exclusive jurisdiction over the unloading of the logs thereon, and this Court has held that it was the duty of the defendant Hallack & Howard Lumber Company to assume and pay for all the injuries and damages that the Union Pacific Railroad Company has been required to pay for the injuries and damages sustained by A. M. Powell.

In the matter that I am to decide, the Hallack & Howard Lumber Company entered into a contract with the third party defendant, W. O. Bedal, in which W. O. Bedal agreed to cut and load the logs in question upon the railroad cars in Banks, Idaho, and under the terms and conditions of said logging contract it was stipulated and agreed as follows, and I quote from the contract: "it [102] is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be in-

curred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement." The part of this that is so outstanding is "that the second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract."

Under the terms and provisions of this contract W. O. Bedal was an independent contractor and had charge and control of the premises in question here which was leased by the Union Pacific to Hallack and Howard Lumber Company and it was while the Third party defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises under the terms and conditions of the logging contract between him and the Hallack & Howard Lumber Company that the said Powell was injured. In addition to the [103] contract itself, under the rule of equity, if the third party Defendant W. O. Bedal was negligent in the unloading of the logs which caused the injury to the

said Powell and his negligence caused the injury to the said Powell under the circumstances here, an implied contract of indemnity also arises in favor of the Hallack & Howard Lumber Company as it has been exposed to this litigation and compelled to pay damages on account of the negligence of Bedal. This right of indemnity is based upon the premise that everyone is responsible for his own negligence, and if another has been compelled by the judgment of a court having jurisdiction, to pay the damages which ought to have been paid by the wrongdoer, that it may be recovered by him. Bedal's position throughout the entire pendency of this matter has been one of not seeming to care. The answer filed by him has admitted that on or about the 13th day of April, 1950, by an instrument in writing, the said A. M. Powell notified the defendant and third party Plaintiff the Hallack & Howard Lumber Company of his claim against the Union Pacific Railroad Company, and his claim against the Hallack & Howard Lumber Company arising out of the facts set forth in the third party complaint. W. O. Bedal has also admitted that on or about the 25th day of April, 1950, the defendant and third party Plaintiff Hallack & Howard Lumber Company by letter notified W. O. Bedal, third party Defendant that it had received a written claim from A. M. Powell, and at that time [104] forwarded to said W. O. Bedal a copy of the claim served by A. M. Powell. W. O. Bedal has also admitted that on or about January 10, 1951, the defendant and third party Plaintiff, Hallack &

Howard Lumber Company, in writing, by registered mail, notified said W. O. Bedal, the third party defendant of the filing of said complaint by the said A. M. Powell and inclosed therewith a copy of the complaint filed by A. M. Powell, and at that time and in that manner notified the said W. O. Bedal, among other things as follows: "This letter is to advise you that the Hallack & Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack & Howard Lumber Company from any liability whatsoever in this matter." All of which more fully appears from a copy of that certain letter from attorneys for the defendant and third party Plaintiffs Phelps & Phelps, Denver, Colorado, who at that time were acting for the Hallack & Howard Lumber Company, a copy of which letter is attached to the third party complaint on file herein. W. O. Bedal has also admitted that the third party defendant W. O. Bedal failed and refused to defend the action of A. M. Powell against the Union Pacific Railroad Company, and refused to pay the claim of said A. M. Powell, and has failed and refused to hold this third party Plaintiff, Hallack & Howard Lumber Company, harmless. [105]

Had it not been for the Act of Congress known as the Railroad Employees Liability Act, this action originally no doubt, would not have been filed against the Union Pacific Railroad Company, it would probably have been filed directly against W. O. Bedal the independent contractor who caused the injury. His conduct, in view of the fact that

he was the acting party throughout this entire case although it isn't a case of estoppel under the law, it is a case of equity or equitable estoppel at lease, because he sat idly by and let the party whom he was doing the work for, the Hallack & Howard Lumber Company become liable here. The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company, and they are the ones who were responsible to the Railroad Company and the Railroad Company was liable and the jury in the case that was tried heretofore found that this was an act of negligence and brought in a verdict against the Union Pacific Railroad Company. Should W. O. Bedal after all these proceedings be allowed to gamble on another jury's verdict which may be different from the jury's verdict already returned in this Court. The first jury found that it was negligence to drop these logs off and let them roll down this hill unrestrained as they were, which caused the slab to break off, which injured Powell. It would be a mockery on [106] justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another adjudication.

This has been a very difficult matter for the Court, I felt that in rendering judgment of \$18,334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Com-

pany and I found it necessary under the law to do that, and I now find it necessary under the law to instruct this jury that I having found in my judgment that the Hallack & Howard Lumber Company was liable to the Union Pacific Railroad Company for \$18,334.15 that I will instruct you as a matter of law to bring in a verdict in favor of the Hallack & Howard Lumber Company and against W. O. Bedal, for the sum of \$18,334.15, that is the amount found due from Hallack and Howard Lumber Company to the Union Pacific Railroad Company, by this Court.

Mr. Chase, I will appoint you as foreman of this jury, you may sign the verdict handed to you.

Sometimes it is necessary for the Court to assume the responsibility in a case of this kind and I felt that it would be an idle procedure for me to send the jury out and then if your verdict was not in accordance with [107] my way of thinking, I would have to change.

The Clerk may file the verdict and Court will be in recess. [108]

State of Idaho,  
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court for the District of Idaho, and

I certify that I took the proceedings and evidence had and given in and about the trial of the above-entitled cause, in shorthand, and thereafter transcribed the same into longhand (Typing) and

I further certify that the foregoing transcript

consisting of pages numbered to page 108 is a true and correct transcript of the evidence given and the proceedings had at the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 6th day of January, 1954.

/s/ G. C. VAUGHAN,  
Reporter.

[Endorsed]: Filed January 7, 1954.

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[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with returns attached.
3. Motion to Dismiss.
4. Stipulation filed Oct. 28, 1952.
5. Minutes of the Court of Nov. 14, 1952.
6. Motion and Order to Bring in Third Party Defendant.
7. Affidavit of Mailing.
8. Summons with returns attached.



9. Motion to Dismiss Original Complaint.
10. Motion for More Definite Statement.
11. Motion to Strike.
12. Motion to Dismiss.
13. Stipulation filed Feb. 27, 1953, and Order attached.
14. Amendment to Third-Party Complaint.
15. Stipulation filed Apr. 7, 1953.
16. Minutes of the Court of April 8, 1953.
17. Order Denying Motions to Dismiss, etc.
18. Order Denying Motions of Deft. and 3rd Party Defendant.
19. Stipulation filed July 29, 1953.
20. Answer of Defendant and 3rd Party Plff. to Plff.'s Complaint.
21. Answer of 3rd Party Deft. to Plff's Complaint, etc.
22. Request for a Jury.
23. Request for Admission (with exhibits—No. 3).
24. Motion to Strike.
25. Answer of W. O. Bedal to Request for Admission (with exhibits—No. 4).
26. Motions to Strike from Answer of W. O. Bedal.
27. Stipulation filed September 15, 1953.
28. Minutes of the Court of September 15, 1953.
29. Order Overruling Motion to Strike.
30. Minutes of the Court of September 21, 1953.
31. Findings of Fact and Conclusions of Law.
32. Objections to Findings and Conclusions.
33. Minutes of the Court of September 22, 1953.
34. Judgment dated September 22, 1953.



[Endorsed]: No. 14197. United States Court of Appeals for the Ninth Circuit. W. O. Bedal, Appellant, vs. The Hallack and Howard Lumber Company, a corporation, Appellees. W. O. Bedal, Appellant, vs. Oregon Short Line Railroad Company, a corporation and Union Pacific Railroad Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Idaho.

Filed: January 11, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated between plaintiffs, defendant and third-party plaintiff, and third-party defendant, through their respective attorneys, that in this action where there has been an appeal from the judgment of the Oregon Short Line Railroad Company and Union Pacific Railroad Company against the defendant Hallack and Howard Lumber Company, and also an appeal from the judgment in favor of Hallack and Howard Lumber Company and against W. O. Bedal, one transcript may be used on both appeals, and further that there need be only one printed record herein, which said printed record will be used for both appeals.

Dated: January 15, 1954.

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and  
Third-Party Plaintiff.

/s/ FRED M. TAYLOR,

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

Attorneys for Third-Party  
Defendant.

[Endorsed]: Filed January 21, 1954, U.S.C.A.

United States Court of Appeals  
for the Ninth Circuit

No. 14,197

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation, and  
THE HALLACK & HOWARD LUMBER COM-  
PANY, a Corporation,

Appellees.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY

Comes Now the appellant and pursuant to Rule 17 (6) of the Rules of the above-entitled Court does hereby set forth the points on which he intends to rely on appeal as follows, to wit:

I.

The the Court erred in denying the motion of third party defendant to dismiss the third party complaint.

II.

That the Court erred in sustaining and granting the motion of third party plaintiff for a directed verdict.

## III.

That the Court erred in its Findings of Fact and Conclusions of Law in the following particulars:

(1) In making the following Finding of Fact:

“That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell’s injuries was that of the defendant, The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to.”

(2) In making that portion the following Conclusion of Law:

“or independent of said lease.”

## IV.

That the Court erred in sustaining the motion of Union Pacific Railroad Company to strike the separate defenses of third party defendant.

## V.

That the Court erred in rendering judgment to Union Pacific Railroad Company.

## VI.

That the Court erred in rendering a judgment in favor of third party plaintiff.

VII.

That the Court erred in ruling on objections to evidence as appears from the transcript of the record.

VIII.

That the Court erred in entering an Order bringing in appellant as third party defendant.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Appellant.

Affidavit of mailing attached.

Service of copy acknowledged.

[Endorsed]: Filed January 25, 1954.

United States Court of Appeals  
for the Ninth Circuit

No. 14,197

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COM-  
PANY, a Corporation, and UNION PACIFIC  
RAILROAD COMPANY, a Corporation, and  
THE HALLACK & HOWARD LUMBER COM-  
PANY, a Corporation,

Appellees.

DESIGNATION OF CONTENTS OF  
RECORD ON APPEALTo the Clerk of the United States Court of Ap-  
peals Ninth Circuit:

W. O. Bedal, appellant to the United States Court of Appeals for the Ninth Circuit, in compliance with Rule 17 (6), hereby designates for inclosure in the record on appeal all of the records, proceedings and evidence in the above-entitled case.

Without restricting the foregoing there is hereby designated for enclosure in the record on appeal all the matters referred to in Rule 75 (g) of the Rules of Civil Procedure, a complete Reporter's Transcript of all proceedings, including but not restricted to evidence offered and received, Exhibits



offered and received, and all papers and proceedings to the end that there shall be included therein the complete record of all the evidence and proceedings in the above-entitled case.

Dated: January 22, 1954.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1954.

